

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: PART 86

-----X
THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

-against-

RICARDO JIMENEZ,

Defendant.
-----X

Present: The Honorable Robert E. Torres

DECISION AND ORDER
Indict. # 3825/2006

Pursuant to an order of the Appellate Division, 1st Department, a hearing was held before this Court to determine the sole issue of whether “the prosecution knew O’Brien¹ had been given a specific quid pro quo for his testimony” against the defendant; and, whether the prosecutor committed a *Brady* violation in failing to disclose such agreement, if one existed (*People v. Jimenez*, 142 AD3d 149 [1st Dept. 2016]).

The People were represented by ADA Noah Chamoy and ADA Terry Gottlieb.² The defendant was represented by Anastasia Heeger, Esq. and Rosemary Herbert, Esq. Testimony was taken from Detective Wendell Stradford, ADA Lisa Mattaway, and Andrew O’Brien.³

¹ Mr. O’Brien was, and still is, in the federal witness protection program. While being questioned by federal authorities as part of his cooperation agreement, he informed a federal agent about a murder in a Bronx movie theater in 1989.

² The Post-Hearing Memorandum of Law was submitted by ADA Nancy Killian and ADA Noah Chamoy on behalf of the People.

³ The parties to this hearing stipulated on the record that the witnesses for this hearing would be utilized by both the defense and the People. They also stipulated to the order it in which they would examine the witnesses.

Findings of Fact

Detective Wendell Stradford⁴ (“Det. Stradford”) testified first on behalf of the People regarding the defendant’s allegation that Det. Stradford was aware of an agreement between ADA Lisa Mattaway and Andrew O’Brien. Det. Stradford testified that he met with and spoke to Andrew O’Brien several times during his investigation into a cold case murder at the Whitestone theater in Bronx County is 1989. Det. Stradford denied ever entering into any *quid pro quo* agreement with Mr. O’Brien regarding his potential testimony against Mr. Jimenez, the defendant. When further questioned by defense counsel as to his role as a conduit between ADA Lisa Mattaway and Mr. O’Brien, Det. Stradford testified (1) that the only thing O’Brien could ever hope for was a reduction in his sentence; (2) that the issue of any *quid pro quo* agreement on behalf of Mr. O’Brien was never discussed with ADA Mattaway; (3) there was never any discussion regarding any agreement in exchange for O’Brien’s testimony; and, (4) when asked by the federal prosecutor handling O’Brien’s federal cooperation obligation⁵ to write a letter on behalf of Mr. O’Brien for his testimony, Det. Stradford stated that he disregarded the request and had no further contact or communication with any of the parties.

ADA Lisa Mattaway testified that she was the prosecuting attorney in this case. She testified that she notified defense counsel Patrick Bruno, Mr. Jimenez’s trial attorney, prior to the trial and in writing, of O’Brien and his request to write a letter that he can have put in his file

⁴ Det. Stradford was assigned to the NYPD Cold Case Squad from 1993 to 2016. In 2001, upon being assigned to this case, he began investigating the present case. Det. Stradford testified at the *Jimenez* trial.

⁵ Mr. O’Brien was required to cooperate with *any* criminal matters he had knowledge of as part of his cooperation agreement with the federal prosecutor.

stating that he testified.⁶ When further questioned regarding her relationship with Mr. O'Brien, she stated that she met with O'Brien on one occasion at a correctional facility prior to the trial and then only met with him again on the day of his testimony at trial. She had no further contact with Mr. O'Brien. She did affirmatively testify that she had no other agreement or gave no further promise to Mr. O'Brien other than the promise to write a letter on his behalf. When questioned regarding Mr. O'Brien's quest to seek leniency from the federal judge on his federal matter ADA Mattaway responded that the only relief she was aware Mr. O'Brien was seeking was the letter from her office.⁹

Mr. Andrew O'Brien testified that Det. Stradford made no promises to him; that AUSA Novak made no promises¹⁰ to him and that ADA Mattaway made no other promises to him other than to write a letter on his behalf. (See Hearing Transcript, July 21, 2017, pages 39-40).

Following the testimony of Mr. O'Brien, the parties rested and requested to file written arguments. After a full review of testimony, hearing exhibits and post hearing submissions, I find that the People accurately disclosed that they would write a letter to be placed in O'Brien's federal file stating that he had testified for the Bronx District Attorney's office in its case of *People v. Jimenez*.

All three witnesses testified credibly about their roles as investigator of the murder, the prosecutor of the murder, and a witness to the murder. Further, the credible testimony clearly

⁶ Court Exhibit 1: Memorandum prepared by ADA Mattaway to Patrick Bruno, dated June 8, 2007.

⁹ADA Mattaway testified that she did not know what a Federal Rule 35 was nor what actions would be taken on Mr. O'Brien's behalf at the federal level.

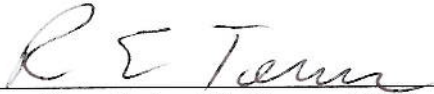
¹⁰Mr. O'Brien testified on cross examination that he did have a disagreement with AUSA Novak regarding the Federal Rule 35 motion because AUSA Novak strongly disfavored a second Federal Rule 35 motion.

establishes there was no *quid pro quo* agreement. I find no evidence of any agreement of any kind other than what the parties disclosed at trial and testified to before this Court at the hearing. There is no evidence before this Court to support the defendant's contention that there was any other agreement made between ADA Mattaway and Andrew O'Brien. I also find no evidence to support that there was any relationship between Det. Stradford and Mr. O'Brien or Det. Stradford and ADA Mattaway concerning any other agreement.

Therefore, the Court finds there was no *quid pro quo* agreement between the Bronx prosecutor's office and Mr. O'Brien and/or the federal prosecutor. The Court further finds no *Brady* violation concerning the understanding between the Bronx prosecutor and Mr. O'Brien and/or the federal prosecutor.

This constitutes the opinion, ruling, and order of the Court.

Dated: June 29, 2018
Bronx, New York



Hon. Robert E. Torres, J.S.C.

Hon. Robert E. Torres, JSC

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF BRONX: CRIMINAL TERM: PART 86

3 THE PEOPLE OF THE STATE OF NEW YORK,

: INDICTMENT NO.
3825-2006

4 -against-

:

: 440 Hearing

6 RICARDO JIMENEZ,

:

7 Defendant.

-----X

8 265 East 161st Street
9 Bronx, New York 10451
May 5, 2017

11 B E F O R E: HON. ROBERT E. TORRES
Justice of the Supreme Court

13 A P P E A R A N C E S:

14 DARCEL D. CLARK, ESQ.
DISTRICT ATTORNEY OF BRONX COUNTY
15 BY: NOAH CHAMOY, ESQ.
TERRY GOTTLIEB, ESQ.
16 Assistant District Attorney

17 OFFICE OF THE APPELLATE DEFENDER
ATTORNEYS FOR DEFENDANT
18 11 Park Place, Suite 1601
New York, New York 10007
19 BY: ANASTASIA HEEGER, ESQ.
ROSEMARY HERBERT, ESQ.
20 JENNIFER LAMBERT, Paralegal

22 VANESSA MOORE
Senior Court Reporter

Proceedings

1 (Whereupon, the following takes place on the
2 record, in open court, in the presence of the Court, the
3 assistant district attorneys, both defense counsel, and the
4 defendant:)

5 THE CLERK: Come to order. Part 86 is now in
6 session. The Honorable Robert E. Torres presiding. Judge,
7 the first case up on the calendar today will be number one.
8 This is indictment 3825 of 2006, Ricardo Jimenez. This
9 matter is scheduled for a hearing. Defendant is produced
10 but not before the Court at this time. Counsel, would you
11 please state your appearances for the record?

12 MR. CHAMOY: Your Honor, ADA Noah Chamoy, Bronx
13 District Attorney's Office.

14 MS. GOTTLIEB: Terry Gottlieb for the Bronx
15 District Attorney's Office.

16 MS. HEEGER: Anastasia Heeger, H-E-E-G-E-R, from
17 the Office of the Appellate Defender.

18 MS. HERBERT: And Rosemary Herbert,
19 H-E-R-B-E-R-T, Office of the Appellate Defender for the
20 defendant.

21 MS. HEEGER: And your Honor, this is our
22 paralegal. Is it okay if she sits up here with us at
23 counsel's table?

24 THE COURT: I assume the People have no
25 objection.

Proceedings

1 MS. GOTTLIEB: No, Judge.

2 MS. LAMBERT: My name is Jennifer Lambert,
3 L-A-M-B-E-R-T.

4 THE COURT: Okay. Thank you. Good morning, all.
5 Is there anything we need to address before we bring the
6 defendant out?

7 MS. HERBERT: Your Honor, we would be requesting
8 copies of the transcripts provided to us at no cost.
9 Mr. Jimenez is indigent and we are assigned counsel.

10 THE COURT: I'll grant that request.

11 MS. HERBERT: Thank you.

12 THE COURT: Anything else. No? Okay. Bring him
13 out.

14 (Whereupon, there is a break in the proceeding at
15 this time.)

16 A COURT OFFICER: Coming out.

17 THE CLERK: Come to order. Judge, this is
18 recalling number one on the calendar, Ricardo Jimenez. Let
19 the record reflect defendant is now present before the
20 Court.

21 THE COURT: Good morning, again. Are there any
22 issues you need to address before we begin? Does either
23 side wish to make a preliminary statement?

24 MR. CHAMOY: Briefly, your Honor.

25 THE COURT: They get to go first.

Proceedings

1 MS. HEEGER: No, your Honor.

2 THE COURT: Okay.

3 MS. HEEGER: We're prepared.

4 MR. CHAMOY: Briefly your Honor, I just wanted to
5 confirm that the scope of this hearing is specified in the
6 Appellate Division decision and that is limited to question
7 of whether or not the prosecutor knew that O'Brien, that is
8 Andrew O'Brien, had been given a specific quid pro quo for
9 his testimony. And that's the issue that's presented in
10 the Appellate Division order.

11 MS. HEEGER: Your Honor, if I could respond. The
12 scope of the hearing is that this matter's been remanded
13 for a hearing of whether the People committed a violation
14 pursuant to Brady v. Maryland by not disclosing the terms
15 of an agreement to assist for defense's production for
16 Andrew O'Brien's testimony. So your Honor, we'd say that
17 the scope of the hearing is looking at any kind of
18 understanding or arrangement that Mr. O'Brien had with the
19 People.

20 THE COURT: Quoting from the decision itself
21 People v. Jimenez, 142 A.D.3d 149, and I believe it would
22 be page --

23 MR. CHAMOY: 162, your Honor.

24 THE COURT: 162. Thank you. Quoting in part,
25 defendant to establish at a hearing that the prosecutor

Proceedings

1 knew that O'Brien had been given a specific quid pro quo
2 for his testimony. That's the scope of the hearing. I
3 know the very last paragraph of the decision can be
4 interpreted to say something different but that's the heart
5 of the decision. So that's the scope. It goes on to say
6 basically set forth based on that what would happen or what
7 the conclusion can be drawn, but that's the basic scope.
8 Anything else we need to address at this time?

9 MR. CHAMOY: Just your Honor, we have an
10 arrangement that we will be calling the witnesses as direct
11 and then the defense will be -- the defendant's attorneys
12 will be cross-examining them.

13 MS. HEEGER: Yes, your Honor. That's correct.

14 THE COURT: Okay. You may call your first
15 witness.

16 MS. GOTTLIEB: Your Honor, at this time the
17 People call Detective Wendell Stradford to the stand.

18 A COURT OFFICER: Witness entering. Just remain
19 standing. Raise your right hand. Place your left hand on
20 the Bible.

21 THE CLERK: Do you solemnly swear or affirm that
22 the testimony you give to this court shall be the truth,
23 the whole truth, and nothing but the truth so help you God
24 or do you so affirm?

25 THE WITNESS: I do.

People-Stradford-Direct(Gottlieb)

1 THE CLERK: Thank you very much. Please be
2 seated.

3 A COURT OFFICER: Please state your name and
4 spell your name for the record.

5 THE WITNESS: Detective Wendell Stradford,
6 S-T-R-A-D-F-O-R-D, Wendell, W-E-N-D-E-L-L.

7 A COURT OFFICER: Command and shield?

8 THE WITNESS: Police Commissioner's office,
9 shield number 3420.

10 THE COURT: Good morning, detective.

11 THE WITNESS: Good morning, sir.

12 THE COURT: You may proceed.

13 MS. GOTTLIEB: Thank you, your Honor.

14 DIRECT EXAMINATION

15 BY MS. GOTTLIEB:

16 Q. Detective Stradford, how long have you been employed
17 by the New York City Police Department?

18 A. Thirty-three years.

19 Q. And detective, what was your -- what was your
20 assignment prior -- where are you assigned presently?

21 A. I'm in the Police Commissioner security detail now.

22 Q. And how long have you been at the Commissioner's
23 office?

24 A. Since September 2016.

25 Q. And prior to September 2016, where were you assigned?

People-Stradford-Direct (Gottlieb)

1 A. The cold case squad.

2 Q. And could you explain to the Court what the cold case
3 squad would do?

4 A. The cold case squad investigates homicides that have
5 occurred where there is a perpetrator known or an unknown
6 perpetrator and no arrest has been made.

7 Q. And when were you first assigned to the cold case
8 squad?

9 A. In 1993.

10 Q. And so how long were you in the cold case squad in
11 total?

12 A. Since 93 to 2016, about 23 years.

13 Q. And detective, did there come a time when you were
14 assigned to investigate the case involving the defendant Ricardo
15 Jimenez?

16 A. Yes.

17 Q. And when were you first assigned that case?

18 A. I believe it was September 2001. Not sure of the
19 month, but it was 2001.

20 Q. And detective, did you testify at a trial in 2000 --
21 in that case?

22 A. I'm sorry?

23 Q. Did you testify in the trial against Ricardo Jimenez?

24 A. Yes.

25 Q. And was that trial held in June of 2007?

1 A. Yes.

2 Q. And detective, as part of your assignment to
3 investigate the case, were you -- did you become aware of an
4 individual by the name of, I think you at that time were calling
5 him A.O.?

6 A. Yes.

7 Q. And who is that individual?

8 A. Andrew O'Brien.

9 Q. And to your knowledge, did Andrew O'Brien testify at
10 the trial against Ricardo Jimenez?

11 A. Yes, he did.

12 Q. Detective, did you make any promises to Andrew O'Brien
13 for his testimony in the trial against Ricardo Jimenez?

14 A. No.

15 Q. Did you at some point after the trial have a
16 conversation with the AUSA regarding a letter?

17 A. Yes.

18 Q. Could you tell the Court what that conversation was?

19 A. The U.S. Attorney at the time was a Mr. Novak. He
20 contacted me in regards to if I was going to write a letter for
21 Mr. O'Brien.

22 Q. Prior to being contacted -- and this was after the
23 trial had occurred. Is that correct?

24 A. Yes.

25 Q. Prior to the -- during the trial or before the trial

People-Stradford-Direct (Gottlieb)

1 before Mr. O'Brien testified, did you ever have any conversation
2 with AUSA Novak about a letter?

3 A. No.

4 Q. So, after the trial, you had a conversation with AUSA
5 Novak?

6 A. Yes.

7 Q. And that was the first time any conversation about a
8 letter from you came up. Is that correct?

9 A. Yes.

10 Q. And what, if anything, did you tell AUSA O'Brien -- I
11 mean Novak?

12 A. I'd have to check with my supervisor.

13 Q. And did you, in fact, check with your supervisor?

14 A. Yes, I did.

15 Q. And after checking with your supervisor, what if
16 anything did you do?

17 A. I was told not to do it and I didn't.

18 Q. And prior to -- did you ever have any conversation
19 with Andrew O'Brien about you writing the letter?

20 A. No.

21 Q. Either before or after the trial?

22 A. No.

23 Q. Did you ever tell Assistant District Attorney Mattaway
24 that you had a conversation with Andrew O'Brien about a letter?

25 A. No, I didn't.

People-Stradford-Cross (Herbert)

1 MR. CHAMOY: No further questions.

2 THE COURT: You may inquire.

3 MS. HERBERT: Thank you, your Honor.

4 CROSS-EXAMINATION

5 BY MS. HERBERT:

6 Q. Good morning, detective.

7 A. Good morning.

8 Q. Now, when you were with the cold case squad in, I
9 think approximately 1999, you were in the special projects unit?

10 A. Yes.

11 Q. And that unit worked closely with federal law
12 enforcement, correct?

13 A. Yes.

14 Q. Specifically the FBI. Is that correct?

15 A. FBI, ATF, Secret Service.

16 Q. DEA?

17 A. All of the federal law enforcement agencies, yes.

18 Q. And in connection with your -- when Mr. O'Brien's name
19 was brought to your attention, that was done in conjunction with
20 the DEA, correct?

21 A. No. I don't remember it that way.

22 Q. You received information relating to Mr. O'Brien from
23 the DEA at some point early in this investigation?

24 A. I don't remember if it was the DEA.

25 Q. Oh. You testified at trial in this case that you

People-Stradford-Cross (Herbert)

1 received information -- or actually at the pretrial suppression
2 hearings in this case that you received information from the
3 DEA. Do you recall that testimony?

4 A. No, I don't.

5 Q. Would you like to review the testimony?

6 A. Yes, ma'am.

7 MS. HERBERT: I direct the witness to page 31 of
8 the hearing testimony -- no. I'm sorry. I think that's
9 the trial testimony. Excuse me. May I approach the
10 witness, your Honor?

11 THE COURT: Just so I'm clear, is this the trial
12 testimony or the hearing testimony?

13 MS. HERBERT: This is the hearing testimony.

14 THE COURT: Could you direct me to the page and
15 line reference to that?

16 MS. HERBERT: Yes. Directing the witness's
17 attention to, I guess it would be, top of page 31 which
18 it's an answer that begins on a prior page starting at line
19 21.

20 Q. Does that refresh your recollection?

21 A. Yes.

22 Q. And in fact, in this case, you did receive information
23 from the Drug Enforcement Agency known as the DEA?

24 A. Yes.

25 Q. And you also received information from the FBI?

People-Stradford-Cross (Herbert)

1 A. I don't recall that. Just please recollect my memory,
2 please.

3 Q. Again, directing -- well, directing the witness's
4 attention to page 320 of the trial testimony, which is tab --
5 and I direct the witness's attention to lines 18 through 21 on
6 page 320 of his trial testimony.

7 A. How far do you want me to go?

8 Q. Just it's the answer that begins at line 18 on page
9 320 and goes to line 21.

10 MS. GOTTLIEB: Judge, I'm going to object. It
11 doesn't talk about anything as to Mr. O'Brien and when they
12 got the information.

13 THE COURT: Can I see it, please?

14 MS. HERBERT: No, you're right. No. You're
15 correct. I'm mistaken on that one.

16 Q. But in connection with this case, there was a special
17 agent from the FBI that was assigned to work with you on this
18 case, correct?

19 A. Ma'am, I don't recall that. No.

20 Q. Agent Diego Redondo?

21 A. Oh, Diego, but he wasn't assigned with us on this
22 case.

23 MS. HERBERT: May I have that binder?

24 Q. In connection with your request to review -- to
25 interview Andrew O'Brien in 2001, that request was made by Agent

People-Stradford-Cross (Herbert)

1 Redondo, correct?

2 A. It could have been.

3 Q. Would it refresh your recollection to review the
4 request form that Agent Redondo prepared?

5 A. Not if he prepared it, no.

6 Q. Well, it relates to your investigation, your request
7 for an interview. You would not have reviewed that?

8 MS. GOTTLIEB: Judge, I'm going to object. I'm
9 not sure what this has to do with the scope of this
10 hearing.

11 THE COURT: Sustained.

12 MS. HERBERT: Your Honor, we're establishing the
13 background prior to the initial contact between this
14 witness and Mr. O'Brien.

15 MS. GOTTLIEB: And again, I --

16 THE COURT: Background as to what? The fact that
17 there was interaction between this detective and federal
18 agencies or agents is a given. So, I don't understand what
19 you're trying to establish as a background.

20 MS. HERBERT: Well, one moment, your Honor.
21 Well, an issue in the case is the status of the
22 investigation whether there was involvement from federal
23 law enforcement in the investigation.

24 THE COURT: That's not initially before me.
25 Whether any conversations or agreements reached is an issue

People-Stradford-Cross (Herbert)

1 before me.

2 MS. HERBERT: That's certainly correct.

3 THE COURT: And whether the D.A. knew about it or
4 not, but asking about -- the line of questioning you're
5 going down doesn't take us there.

6 MS. HEEGER: Your Honor, if I may. One of the
7 issues is what the prosecutor's office would have been
8 aware of and one of the issues involves what the federal
9 end of this was doing with Mr. O'Brien and what the
10 prosecutor's office could or should have been aware of what
11 the feds were doing.

12 So, that was an issue in this case and the People
13 have taken a position on this issue that they were -- that
14 their office was not aware of what the federal authorities
15 were doing or the FBI was doing and that there was no
16 evidence of a joint investigation. That's been a position
17 of their office. We're trying to establish that there
18 actually is evidence of a joint investigation.

19 THE COURT: Okay. First off, for clarity in the
20 record and all fairness and this goes for both sides, you
21 have multiple attorneys at each table. I want the
22 arguments restricted to just one person speaking.

23 MS. HEEGER: Understood, your Honor.

24 THE COURT: That goes for both sides. Again, the
25 fact that -- well, withdrawn. Are you trying to find out

People-Stradford-Cross (Herbert)

1 whether a federal agency was actively involved in the
2 investigation of this incident and your client? Is that
3 what you're trying to find out?

4 MS. HERBERT: Yes. That's part of it, yes.

5 THE COURT: So why don't you ask that question?

6 MS. HERBERT: Okay. Very well.

7 Q. Detective Stradford, was there FBI involvement in the
8 investigation? I'm referring specifically now to the initial
9 stages where Mr. O'Brien was brought to the cold case squad's
10 attention.

11 MS. GOTTLIEB: I'm going to object. I'm not sure
12 what that question means.

13 THE COURT: Objection overruled. If the
14 detective feels he can answer it, he can answer.

15 A. Can you repeat that, please?

16 Q. I think so. At that initial stage in the
17 investigation, was there FBI involvement?

18 MS. GOTTLIEB: Again, that's a different
19 question.

20 THE COURT: The problem is the term involvement.
21 We know there was FBI involvement.

22 MS. HERBERT: Perhaps I could be more specific.

23 THE COURT: We know that there is some connection
24 to the PBA. The trial transcript will speak for itself. I
25 believe all of this came out at trial as to the series of

People-Stradford-Cross (Herbert)

1 law enforcement agencies that were contacted with counsel's
2 knowledge that eventually ended up on the detective's desk.
3 So, you know, either rephrase your question or move on.

4 MS. HERBERT: Very well.

5 Q. With respect to the initial status of the
6 investigation, when you first contacted Mr. O'Brien, were you
7 working with an agent from the FBI or in conjunction with an
8 agent from the FBI?

9 A. In special projects we work with federal law
10 enforcement, FBI, DEA, ATF, and any other acronym you can think
11 of. They were assigned to our office to help us to pursue cases
12 that were being investigated to that end. That's it.

13 Q. And specifically with regard to this case, was Agent
14 Redondo assisting you with this case at that point?

15 A. I would contact the FBI and other agencies to assist
16 me in procuring documents that I couldn't get myself, that I had
17 no access to.

18 Q. And Agent Redondo in this case assisted you in making
19 contact setting up an interview with Mr. O'Brien?

20 A. He did make Mr. O'Brien -- well, actually he made a
21 request through the U.S. Marshals Service for me.

22 Q. And you provided him with information that was the
23 basis of that request?

24 MS. GOTTLIEB: I'm going to object to the form of
25 that question.

People-Stradford-Cross (Herbert)

1 THE COURT: I'm not clear as to what you're
2 asking here.

3 MS. HERBERT: I'm asking whether this witness
4 provided information to Agent Redondo who then used that
5 information making his request to the Marshal Service.

6 THE COURT: Well, he told you that he made a
7 request or asked the agent to contact the U.S. Marshals on
8 his behalf. So, we have that.

9 MS. HERBERT: Correct, your Honor. I'm asking if
10 he provided information regarding the basis for that
11 request.

12 THE COURT: So are you asking did he just make a
13 request out of the clear blue or he gave a basis for his
14 request?

15 MS. HERBERT: The latter.

16 THE COURT: Is that what you're asking?

17 MS. HERBERT: Yes.

18 THE COURT: Detective, did you just tell him can
19 you make this request for me or did you give him a reason
20 why you're making a request?

21 THE WITNESS: No. Just a request from
22 Mr. O'Brien.

23 THE COURT: Okay. Next question.

24 Q. In your career in particularly working with the cold
25 case squad, you've worked with cooperating witnesses from time

People-Stradford-Cross (Herbert)

1 to time?

2 A. Yes.

3 Q. And some of those witnesses have had pending cases,
4 correct?

5 A. Yes.

6 Q. Some of those cases -- some of those witnesses, those
7 cooperating witnesses, actually had convictions?

8 A. Yes.

9 Q. And when working with a cooperating witness, it's
10 important obviously for you to vet the witness, to do your due
11 diligence with respect to the witness?

12 MS. GOTTLIEB: Objection.

13 THE COURT: I'll allow you some leeway. As this
14 is, I'm using the word some. You may answer the question.

15 Q. With respect to a cooperating witness you vet the
16 witnesses, you do due diligence with respect to those witnesses?

17 A. Yes.

18 Q. And in your experience, cooperating witnesses
19 frequently expect something in return for their cooperation?

20 MS. GOTTLIEB: Objection.

21 THE COURT: Sustained. The issue is not what
22 people generally expect. The issue is what happened in
23 this case.

24 MS. HERBERT: Certainly, your Honor, but it goes
25 to this witness's state of mind as he's entering into this

People-Stradford-Cross (Herbert)

1 interview and into this, what turned out to be a longterm
2 relationship with Andrew O'Brien.

3 THE COURT: I'll still sustain the question.
4 Move on.

5 Q. And how did you first learn that Mr. O'Brien had
6 information regarding this homicide?

7 A. I don't really remember.

8 Q. Did you speak to Mr. O'Brien directly?

9 A. That wouldn't have been possible.

10 Q. So, the information did not come to you in the form of
11 a phone call from Mr. O'Brien?

12 MS. GOTTLIEB: Objection.

13 THE COURT: Side bar.

14 (Whereupon, the following discussion takes place
15 on the record, at the sidebar, in the presence of the
16 Court, the assistant district attorneys, and both defense
17 counsel:)

18 THE COURT: What's the basis for that question?

19 MS. HERBERT: Your Honor, we're just -- we're
20 trying to establish -- I mean, we know that he's -- he
21 spoke to O'Brien. We know that he began his relationship
22 and we're trying to find out how he first learned of
23 Mr. O'Brien. It's a pretty fundamental question.

24 MR. CHAMOY: Your Honor?

25 THE COURT: Go ahead.

People-Stradford-Cross (Herbert)

1 MR. CHAMOY: If I may. There are two problems
2 with that. One, it's entirely irrelevant to this
3 proceeding, but two, he also describes his relationship in
4 his hearing and trial testimony going back and that
5 information is part of this record.

6 MS. HERBERT: And it's something that we
7 anticipate exploring down the road.

8 THE COURT: That's the problem I have. You have
9 trial testimony as to how this scenario unfolded in terms
10 of the information getting to fundamentally you would say
11 police department. And obviously a trial transcript speaks
12 for itself and I believe there is initial contact with a
13 prosecutor in Brooklyn, a detective, turned over to
14 somebody and then it gets to this detective. We have that
15 in record. I don't think there is a good faith basis to
16 ask that particular question. I'm not necessarily
17 precluding or taking a position that you're precluded from
18 exploring what interactions he had with Mr. O'Brien, but
19 you know, we seem to be going around in circles where we
20 have a very long history of extensive records, multiple
21 layers in review of this case. So, we really should be
22 narrowing and getting to the point.

23 MS. HERBERT: Your Honor, one of the things that
24 is concerning in this case is there are long gaps in time,
25 information based on the trial record comes to the cold

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1 case squad in -- it's first in 1998, but then in 1999 and
2 then no action's taken until 2001. Now, we just have no
3 information about what happened in that period and the
4 witness may tell us that nothing happened or he may --

5 THE COURT: Why don't you just ask him that?

6 MS. HERBERT: I do.

7 THE COURT: There's no basis to ask did he call
8 you. That's the bottom line. There's no basis for that
9 question based on the record that the Court is aware of.
10 So I'm not precluding you from exploring that area, but you
11 have to be more direct with your questions. We have to
12 move this along.

13 MS. HERBERT: Certainly, your Honor. Just with
14 regard to that, I mean, there is evidence in the record
15 that he called the cold case squad. That was his
16 testimony.

17 THE COURT: Why don't you just ask him that?

18 MS. HERBERT: Okay.

19 THE COURT: Why don't you just ask him did you
20 ever talk to him on the phone?

21 MS. HERBERT: That was my next question.

22 THE COURT: You know, we can eliminate -- there's
23 no jury here. We can eliminate, you know, the circle of
24 whatever. Let's just get to the point and move on.

25 MS. HERBERT: Okay.

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1 THE COURT: Okay?

2 MS. HERBERT: Understood, your Honor.

3 THE COURT: All right. Thank you.

4 (Whereupon, the following takes place in open
5 court:)

6 Q. Detective, in 19 --

7 THE COURT: I'm sorry. Just so the record is
8 clear, the objection is sustained.

9 MS. GOTTLIEB: Thank you, Judge.

10 THE COURT: Continue.

11 Q. In 1999 when you were given information regarding
12 Mr. O'Brien, did you have further contact with Mr. O'Brien
13 before you interviewed him in 2001?

14 A. Given information and further contact is not the same
15 thing.

16 Q. I guess did you speak to -- in that time period, I'm
17 talking about between when you first learned the information and
18 when you met with him in 2001, did you speak with him on the
19 telephone?

20 A. No.

21 Q. Did you exchange correspondence with him?

22 A. He wasn't allowed.

23 Q. He wasn't allowed to correspond?

24 A. No. I had to -- no. There was no correspondence on
25 the phone, not in the time frame that you're speaking of.

People-Stradford-Cross (Herbert)

1 Q. Okay. And so, when you did go to -- and you knew at
2 this point that Mr. O'Brien was a federal prisoner?

3 A. Yes.

4 Q. That he was serving a federal sentence?

5 A. Yes.

6 Q. And you learned that information before you went to
7 visit him?

8 A. Yes.

9 Q. And, in fact, you learned that he was a protected
10 witness?

11 A. Yes.

12 Q. He was in the federal witness security program?

13 A. He's in WITSEC, yes.

14 Q. Which is why you had to go through this procedure with
15 Agent Redondo in order to meet with him?

16 A. It was a shortcut, yes.

17 Q. And before you -- before you met with Mr. O'Brien in
18 2001, you had reviewed the original case file from the 45th
19 Precinct, correct, just to bring yourself up to speed on the
20 case?

21 MS. GOTTLIEB: Objection.

22 THE COURT: I'll allow it. You may answer.

23 A. Yes.

24 Q. And you learned from that file that Mr. Jimenez had
25 been a suspect in 1989?

People-Stradford-Cross (Herbert)

1 MS. GOTTLIEB: Objection.

2 THE COURT: I'll allow that. You may answer.

3 A. Yes.

4 Q. And now, before you met with Mr. O'Brien in 2001, did
5 you have any information that he knew the shooter's name in the
6 incident that you were investigating?

7 A. Well, to clarify your question, I don't remember if it
8 was 2001 that I met with Mr. O'Brien.

9 Q. Would the report that was generated, or your DD-5,
10 refresh your recollection about the date?

11 A. Yes.

12 MS. HERBERT: One moment. I'm providing the
13 witness with the DD-5 that he completed following his
14 interview with Mr. O'Brien.

15 THE WITNESS: Okay.

16 Q. Does that refresh your recollection about the date of
17 the meeting?

18 A. Yes.

19 Q. And what was that date?

20 A. January 16th.

21 Q. Of?

22 A. 2001.

23 Q. Okay. And so that was obviously a considerable period
24 of time after you initially received information through, I
25 believe it was, Detective Pfeiffer?

People-Stradford-Cross (Herbert)

1 MS. GOTTLIEB: Objection.

2 THE COURT: I'll allow it. I think it's obvious,
3 but I'll allow it. You may answer.

4 A. Considerable period of time for you or for me?

5 Q. Well, I guess a period of time of almost two years?

6 A. Yes. It was almost about that. Yes.

7 Q. Thank you. Now, as part of your due diligence in this
8 case, you thoroughly reviewed the information that you received
9 from the DEA regarding Mr. O'Brien?

10 MS. GOTTLIEB: Objection.

11 THE COURT: Sustained.

12 Q. And before meeting with Mr. O'Brien, did you review a
13 FBI 302, a report that was prepared dealing with Mr. O'Brien?

14 MS. GOTTLIEB: Objection.

15 THE COURT: Sustained. I don't see how this goes
16 to the issues before the Court.

17 Q. What did you do prior to meeting with Andrew O'Brien
18 in order to vet him to determine background information about
19 whether he might be a reliable witness?

20 A. I'm not really sure how to answer that question
21 because until you meet a person you can't determine whether
22 they're reliable or, you know, a good witness. I hadn't met him
23 before that time.

24 Q. So, just if I understand your answer then, you had not
25 reviewed materials or done other vetting prior to meeting with

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1 Mr. O'Brien?

2 MS. GOTTLIEB: Objection.

3 MS. HERBERT: Your Honor, I'm simply trying to
4 understand the witness's answer.

5 THE COURT: Detective, before you met with
6 Mr. O'Brien, you yourself, was he in federal custody?

7 THE WITNESS: Yes.

8 THE COURT: And you knew his status of federal
9 custody at that time?

10 THE WITNESS: Yes.

11 THE COURT: What, if anything else, did you know
12 about his background before you met with him?

13 THE WITNESS: His criminal history.

14 THE COURT: Move on.

15 Q. Moving to the January 16, 2001 interview with
16 Mr. O'Brien, who besides you was at that meeting?

17 A. Agent Redondo.

18 Q. Anyone from the Marshals Service?

19 A. Not that I recall, no.

20 Q. Your recollection was just you, Agent Redondo,
21 and Mr. O'Brien?

22 A. And whoever was -- probably someone from BOP, Bureau
23 of Prisons.

24 Q. Do you recall who that individual was?

25 A. No.

People-Stradford-Cross (Herbert)

1 Q. And approximately how long did this interview last?

2 MS. GOTTLIEB: Objection.

3 THE COURT: I'll allow it. If he remembers.

4 A. I don't recall. I don't recall.

5 Q. Was it short? Did it last for two hours?

6 MS. GOTTLIEB: Objection.

7 THE COURT: He said he doesn't recall. Do you
8 have any idea how long it was?

9 THE WITNESS: No, sir.

10 THE COURT: Move on.

11 Q. And who -- how did the interview proceed? Were you
12 asking questions of the witness?

13 A. Yes.

14 Q. And during that interview, did Mr. O'Brien tell you
15 why he had contacted the cold case squad several years prior?

16 A. You say that and I don't know where that came from
17 about Mr. O'Brien contacting the cold case squad. You're --

18 Q. I can provide you -- with the Court's indulgence, I
19 can provide you with -- it's again -- directing your attention
20 to page 340 of the trial testimony which I believe is in the
21 binder if you still have it. It's tab B, 340.

22 A. Okay.

23 Q. And throughout this there's a discussion of this
24 initial contact?

25 A. What line?

People-Stradford-Cross (Herbert)

1 Q. Well, it's really the entire page. It's at the bottom
2 of the page on line 24. The question refers to a lady detective
3 Pfeiffer mentioned and then on the following page you agreed.
4 If you wanted to review that.

5 MS. GOTTLIEB: Judge, I'm going object to this.
6 First of all, it doesn't talk about timeframe and it
7 doesn't really answer Detective Stradford's questions as
8 far as I can tell and I think the transcript speaks for
9 itself.

10 THE COURT: Somebody show me what's being
11 referred to.

12 THE WITNESS: Sir, you want this?

13 THE COURT: Thank you.

14 MS. HERBERT: And just for the Court's
15 information, this is also discussed at page 321 about the
16 trial testimony of Detective Stradford.

17 THE COURT: Side bar.

18 (Whereupon, the following discussion takes place
19 on the record, at the sidebar, in the presence of the
20 Court, the assistant district attorneys, and both defense
21 counsel:)

22 THE COURT: Read back the question to me, please.

23 (Whereupon, the last question was read back at
24 this time.)

25 THE COURT: Can you just pull down exactly what

People-Stradford-Cross (Herbert)

1 he said because I'm missing something?

2 MS. HERBERT: Okay. Beginning here there is --
3 there's a detective that worked in my office. This is the
4 witness testifying. She was sent to the Brooklyn office.
5 She mentioned to me that she entered into this discussion.
6 This was a person who had some information on a homicide in
7 the Bronx and then it goes down here and then there's a
8 further discussion. I don't know that the name is
9 mentioned there, but there's a further discussion which
10 appears on page, I believe it's, 340 through 341. It's
11 Detective Pfeiffer who's the female detective in cold case
12 that's mentioned.

13 THE COURT: Yeah, but I think your line of
14 questioning was suggesting that Mr. O'Brien contacted cold
15 case squad directly and that doesn't -- that doesn't
16 support that, what you're showing this detective.

17 MS. HERBERT: Mr. O'Brien also testified to that
18 fact at trial, that he contacted the cold case squad.

19 THE COURT: Okay. But you're asking this
20 detective -- you're asking your questions wrong, quite
21 honestly. You know, he says he doesn't recall. I believe
22 he doesn't recall. He doesn't know that Mr. O'Brien
23 contacted cold case directly. Okay? I believe that's what
24 he just said. You're asking him to look at something to
25 refresh his recollection that doesn't really go to that

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1 issue. We're just talking about the information of a chain
2 of contacts. Okay? So, I'm going to sustain the objection
3 as to the way you're approaching the subject and we can
4 take it from there.

5 MS. HERBERT: Okay. Very well.

6 (Whereupon, the following takes place in open
7 court:)

8 THE COURT: The objection is sustained.

9 Q. Detective, during your interview in 2001 with
10 Mr. O'Brien, did he discuss with you why he was speaking to you
11 about this homicide?

12 A. I'm sure he did.

13 Q. And what did he say about that?

14 A. That was a friend of his that was murdered in the
15 Bronx.

16 Q. Was that the only thing that he discussed with you as
17 to why he was coming forward?

18 A. Yes.

19 Q. Did he indicate to you when you were meeting with him
20 that he was interested in getting some time off of his federal
21 sentence?

22 A. No.

23 Q. He never mentioned that to you?

24 A. Are we talking about January 16, 2001?

25 Q. Absolutely.

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1 A. No.

2 Q. When the interview with Mr. O'Brien concluded, did you
3 make any arrangements to speak with him further?

4 A. Not then, no.

5 Q. Did you at some point make arrangements to speak with
6 him further?

7 A. Yes.

8 Q. And when did that occur?

9 A. I couldn't even tell you.

10 Q. Did you provide him with your telephone number?

11 A. Not allowed.

12 Q. I'm sorry?

13 A. Not allowed.

14 Q. Not allowed. What didn't allow you?

15 A. The U.S. Marshals Service.

16 Q. Did you make any other type of arrangements for him to
17 stay in touch with you going forward?

18 A. Through the Marshal Service, yes.

19 Q. And obviously at some point after that meeting, you
20 did have further contact with Mr. O'Brien. Is that correct?

21 A. Yes.

22 Q. And, in fact, over the course of the years he called
23 you on a number of occasions?

24 A. He called me, yes.

25 Q. In your office presumably?

People-Stradford-Cross (Herbert)

1 A. Yes.

2 Q. And was there any other form of contact or was it
3 exclusively by telephone?

4 A. There were a couple of visits to the facility. I
5 don't remember how many. Other than that, it was by telephone.

6 Q. And the visits to the facility that you're mentioning,
7 was that -- was that just you meeting with Mr. O'Brien or were
8 there other people involved in those visits?

9 A. No. It could have been my partner and someone else.

10 Q. And who was your partner?

11 A. Detective Thomas, Denise Thomas.

12 Q. And at those meetings at the facility after 2001, did
13 Mr. O'Brien in any of those meetings indicate to you that he was
14 interested in reducing his sentence, his federal sentence?

15 A. No.

16 Q. That's something that never came up?

17 A. No.

18 Q. Did he ask you during those meetings for anything --
19 for anything at all, for you to provide him with anything?

20 A. No.

21 Q. And during the phone calls that you referred to, first
22 of all, approximately how many phone calls did you receive from
23 Mr. O'Brien after your interview?

24 A. I don't know.

25 Q. More than two?

People-Stradford-Cross (Herbert)

1 A. I don't know. I don't know.

2 Q. And what was discussed during those phone calls?

3 A. I don't remember.

4 Q. Presumably it was this case and his knowledge of this
5 case?

6 MS. GOTTLIEB: Objection.

7 THE COURT: I'll allow that question. Overruled.

8 A. A person at WITSEC is restricted from the types of
9 conversations they are allowed to have over the phone. So we
10 would not have spoken about that in particular over the phone.
11 The phone calls are recorded.

12 Q. Okay.

13 A. He is not allowed to have certain types of
14 conversations with law enforcement over the phone. That's why
15 we had to go visit him in the facility.

16 Q. So when he called you, you would not be discussing
17 this case or presumably any other case?

18 A. I don't remember what we talked about.

19 Q. During any of those conversations, did he ever ask you
20 to do anything for him?

21 A. No.

22 Q. Did you keep any record of those telephone calls?

23 A. No.

24 Q. You didn't keep any logs or notes of the calls?

25 A. No.

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1 Q. You prepared an affidavit in connection with these
2 proceedings, correct?

3 A. I believe so, yes.

4 Q. And in that affidavit, you indicated that in phone
5 calls that Mr. O'Brien made to you he wanted to provide
6 information on other homicides to you. Is that accurate?

7 A. Yes.

8 Q. So, during those phone calls, he was in fact talking
9 about -- about other cases, other homicides?

10 A. He wanted to provide in me allowing him to talk about
11 those two different things. We couldn't talk about certain
12 things over the phone. It had to be done in person.

13 Q. And so, in those subsequent meetings that you had with
14 him, did you discuss these other matters that -- these other
15 homicides?

16 A. Not that I recall.

17 Q. So he did not provide information or testimony
18 regarding other homicides?

19 MS. GOTTLIEB: Objection.

20 THE COURT: Overruled.

21 A. Not that I recall.

22 Q. Following your meeting in January of 2001, did you
23 bring the information you had to the district attorney's office?

24 A. Yes.

25 Q. Do you recall when that happened?

People-Stradford-Cross (Herbert)

1 A. No.

2 Q. Was it soon after that interview or was it a long time
3 after?

4 A. I'm not sure.

5 Q. Now, you testified at trial that that occurred
6 sometime in 2001?

7 A. Yes.

8 Q. And so that's when you would have gone to the district
9 attorney's office with the information about Mr. Jimenez's case?

10 A. Yes.

11 Q. Okay. And was the -- did the district attorney's
12 office assign a prosecutor to the case and proceed with the case
13 in 2001?

14 A. Initially, no. There was no -- there was no D.A.
15 assigned because I was away. I was sick, and then 9/11
16 occurred.

17 Q. And did the district attorney's office inform you as
18 to why they were not assigning a D.A. at that point?

19 MS. GOTTLIEB: Objection.

20 THE COURT: Sustained.

21 Q. But now at some point the case was assigned to
22 Assistant District Attorney Lisa Mattaway. Is that correct?

23 A. Yes.

24 Q. And approximately when did that happen?

25 A. I don't remember.

People-Stradford-Cross (Herbert)

1 Q. Was it in 2001?

2 A. I don't remember.

3 Q. And then after the case was assigned to ADA Mattaway,
4 did Mr. O'Brien -- was he still calling you at that point?

5 A. I'm sorry?

6 Q. After the case was assigned to Ms. Mattaway, did
7 Mr. O'Brien still call you? Was he still calling you at that
8 point in time?

9 A. It's possible. I'm not sure.

10 Q. And did he continue -- after the case was assigned to
11 ADA Mattaway, did he continue to indicate to you that he wanted
12 to provide information about other homicides?

13 MS. GOTTLIEB: Objection.

14 THE COURT: I'll allow it. You may answer.

15 A. He might have. Yes.

16 Q. And did you act as an intermediary and a go-between
17 between ADA Mattaway and Mr. O'Brien?

18 MS. GOTTLIEB: Objection to the form of the
19 question.

20 THE COURT: As to the phraseology of that
21 question, sustained.

22 Q. Well after the case was assigned to ADA Mattaway, did
23 you meet subsequently with Mr. O'Brien?

24 A. Yes.

25 Q. Was ADA Mattaway present at those meetings -- well,

People-Stradford-Cross (Herbert)

1 first of all, was there more than one meeting? Excuse me.

2 A. She was present at one. I don't remember if there was
3 more than one. She was present at one. Yes.

4 Q. Would it be fair to say that you had additional
5 contact with Mr. O'Brien where ADA Mattaway was not present
6 during that period of time?

7 A. Maybe one other time.

8 Q. And did you convey any information to Mr. O'Brien from
9 ADA Mattaway?

10 A. No.

11 Q. And did Mr. O'Brien ever ask you to convey information
12 to ADA Mattaway?

13 A. No.

14 Q. Did Mr. O'Brien ever tell you shortly prior to the
15 beginning of the trial in this case that he was ready to go?

16 A. Is that a quote?

17 MS. GOTTLIEB: I'm going to object.

18 Q. It is a quote.

19 A. Attributed to me?

20 Q. I can show you.

21 MS. HERBERT: Court's indulgence for a moment.

22 THE COURT: Well, the witness asked for
23 clarification.

24 MS. HERBERT: I'm seeking the clarification, your
25 Honor.

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1 MS. GOTTLIEB: Judge, I'd ask what we're showing
2 the witness.

3 MS. HERBERT: They're emails that were provided
4 to us from the district attorney's office.

5 THE COURT: Show it to counsel so they know what
6 you're referring to.

7 MS. GOTTLIEB: Again, I'm going to object because
8 it's not what the email says, that I'm ready to go.
9 It's -- she's misphrasing it.

10 THE COURT: Let me see it, please.

11 MS. HERBERT: I can certainly --

12 MS. GOTTLIEB: I'm not sure.

13 MS. HERBERT: Rephrase the language, your Honor?

14 THE COURT: Rephrase it, please.

15 MS. GOTTLIEB: Objection for rephrase the
16 question.

17 MS. HERBERT: One moment, please.

18 Q. Did Mr. O'Brien call you shortly before the beginning
19 of trial in this case and tell you that he was, quote, on board
20 and ready?

21 A. I don't remember.

22 Q. If I can ask you to take a look at the highlighted
23 portion of that document.

24 A. This is a message from Lisa Mattaway. My name's not
25 mentioned other than the fact that she got a call from me today.

People-Stradford-Cross (Herbert)

1 Q. I'm specifically asking if that refreshes your
2 recollection as to any conversation you may have had between
3 with Mr. O'Brien that you relayed to ADA Mattaway?

4 MS. GOTTLIEB: Judge, I'm mostly objecting
5 because she's trying to quote somebody and that's not even
6 a quote. I think this whole line of questioning is
7 misleading and not what that document even talks about.
8 It's not a quote from anybody.

9 THE COURT: To the extent that the inference
10 that's a direct quote of what Mr. O'Brien may or may not
11 have said, the objection's sustained. Can I see this
12 letter for a second, please? And for clarity of the
13 record, we have been referring to an email from Lisa
14 Mattaway to a David Novak dated June 13, 2007. Next
15 question.

16 Q. Now, you indicated you met with Mr. O'Brien again in
17 2006. Is that correct?

18 A. I didn't indicate that. You didn't ask me that.

19 THE COURT: He didn't indicate that at this
20 proceeding.

21 Q. It is correct, is it not, that you met with Andrew
22 O'Brien in 2006 along with ADA Lisa Mattaway?

23 A. If that's when it was, yes.

24 Q. And that occurred at a correctional facility in New
25 York State where Mr. O'Brien was, correct?

People-Stradford-Cross (Herbert)

1 A. Yes.

2 Q. And who else was present at that meeting besides
3 yourself, Mr. O'Brien, and Ms. Mattaway?

4 A. Probably personnel from BOP and Detective Thomas.

5 Q. And that's your partner Detective Thomas?

6 A. Yes.

7 Q. And at that meeting, was the possibility of
8 Mr. O'Brien testifying discussed?

9 A. I'm sure it was. Yes.

10 Q. And who brought up that topic?

11 A. The district attorney.

12 Q. And did Mr. O'Brien indicate at that meeting that he
13 would -- that he wanted something in exchange for testifying?

14 A. No.

15 Q. Did the subject of Ms. Mattaway writing a letter for
16 Mr. O'Brien come up at that meeting?

17 A. No.

18 Q. It was not discussed at all?

19 A. No.

20 Q. And Mr. O'Brien never asked you to write a letter at
21 that meeting?

22 A. No.

23 Q. Now, in connection with having Mr. O'Brien produced to
24 testify at trial in this case, you worked with a federal
25 prosecutor in Virginia, that's AUSA David Novak?

People-Stradford-Cross (Herbert)

1 A. That's not really correct though, but Mr. Novak was
2 the U.S. Attorney in Virginia, yes.

3 Q. And you had some contact with him in connection with
4 this case and with the production of Mr. O'Brien?

5 A. The U.S. Marshals are responsible for producing the
6 defendant -- the witness.

7 Q. But as the AUSA responsible for Mr. O'Brien, did you
8 have to work through Mr. Novak to get to the U.S. Marshals
9 office?

10 A. I had to speak to Mr. Novak to get permission to speak
11 with Mr. O'Brien.

12 Q. And do you recall approximately when those -- that
13 conversation occurred?

14 A. No, ma'am.

15 Q. And was there one conversation or more than one
16 conversation between you and detective, I'm sorry, AUSA Novak?

17 A. It was more than one.

18 Q. Several conversations?

19 A. It was more than one.

20 Q. And during those conversations with AUSA Novak, did
21 the subject of your writing a letter on Mr. O'Brien's behalf
22 come up?

23 MS. GOTTlieb: Judge, I'm going to object to the
24 form of the question for a time frame.

25 MS. HERBERT: This question is directed at the

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1 period of time prior to trial.

2 MS. GOTTLIEB: Can we rephrase the question,
3 Judge?

4 MS. HERBERT: I'm happy to rephrase.

5 THE COURT: Prior to the trial, did you ever talk
6 to Mr. Novak about you writing a letter on behalf of
7 Mr. O'Brien?

8 THE WITNESS: No, sir.

9 THE COURT: Next question.

10 Q. The conversation that you described on direct whereby
11 AUSA Novak contacted you after the trial to ask you about
12 writing a letter, do you recall your testimony on direct?

13 A. That I said that he contacted me?

14 Q. That you discussed with him. I'm not sure who
15 contacted who, but you discussed with him?

16 A. I don't understand your question.

17 Q. You testified on direct examination that Mr. Novak,
18 AUSA Novak, contacted you after the trial about writing a letter
19 for Mr. O'Brien?

20 MS. GOTTLIEB: Objection. That's not his
21 testimony.

22 THE COURT: The testimony is that there was a
23 conversation between this witness and the assistant U.S.
24 district attorney about a letter.

25 MS. HERBERT: I can certainly explore.

People-Stradford-Cross (Herbert)

1 Q. With regard to that conversation that you testified to
2 on direct, did you contact Mr. Novak or did Mr. Novak contact
3 you?

4 A. I don't recall.

5 Q. Was this an in-person conversation or telephone
6 conversation?

7 A. Mr. Novak's in Virginia. I was here in New York. So
8 it had to be telephonically.

9 Q. And during that conversation, Mr. Novak asked if you
10 would write a letter on behalf of Mr. O'Brien?

11 MS. GOTTLIEB: Objection to the form of the
12 question.

13 THE COURT: Overruled.

14 A. Could you --

15 Q. Certainly. During that conversation, Mr. Novak asked
16 if you were going to write a letter on Mr. O'Brien's behalf?

17 A. If I was going to write a letter, yes.

18 Q. He asked you that question?

19 A. Yes.

20 Q. And you indicated that you would need to speak to a
21 supervisor?

22 A. I don't recall if I indicated that to him, but I had
23 to speak to a supervisor. I couldn't just do it.

24 Q. Now, the letter that was the subject of this
25 conversation, did Mr. Novak explain or did you ask what sort of

People-Stradford-Cross (Herbert)

1 a letter that was?

2 A. No.

3 Q. What did you think he was referring to?

4 A. I'm aware of what type of letter.

5 Q. Well, can you share that with me?

6 A. It's a letter about Mr. O'Brien's, you know, his
7 testimony and cooperation.

8 Q. And in that conversation, did Mr. Novak explain what
9 he expected that letter might be used for?

10 A. Yes.

11 Q. And what was that?

12 A. It's called a 5K. I guess something to do with his
13 sentence or whatever. I'm not sure.

14 Q. So, your understanding based on that conversation with
15 Mr. Novak was that the letter referred to would be used in
16 connection with a sentence reduction or something relating to
17 reducing Mr. O'Brien's sentence?

18 MS. GOTTLIEB: Objection.

19 A. No.

20 THE COURT: Overruled.

21 Q. No that was not discussed or that was not --

22 A. No.

23 Q. Well, what did Mr. Novak tell you about what purpose
24 the letter might be used for?

25 A. I didn't ask. It's just assumed.

People-Stradford-Cross(Herbert)

1 Q. And when you -- and so what did you tell Mr. Novak
2 during that conversation with regard to the letter?

3 A. I'm sure I had to speak to my supervisor.

4 Q. And what did you -- what did you tell Mr. Novak after
5 you spoke to your supervisor?

6 A. I didn't.

7 Q. You never got back to Mr. Novak at all?

8 A. No.

9 Q. Did you speak to ADA Mattaway about this request after
10 your conversation with Mr. Novak?

11 A. No.

12 MS. HERBERT: Just a moment, your Honor. Nothing
13 further, your Honor.

14 THE COURT: Anything further?

15 MS. GOTTLIEB: Just one moment, Judge. Nothing
16 further, Judge.

17 THE COURT: You may step down. Thank you. Have
18 a good day.

19 THE WITNESS: Thank you. You too, sir.

20 THE COURT: Counsel, want to step up?

21 (Whereupon, a bench conference was held off the
22 record.)

23 MS. GOTTLIEB: I'm just going to mark these.

24 (Whereupon, People's Exhibit 1 and 2 are into
25 Evidence.)

People-Mattaway-Direct (Gottlieb)

1 MS. GOTTLIEB: Your Honor, at this time the
2 People call ADA Lisa Mattaway to the stand.

3 A COURT OFFICER: Witness entering. Remain
4 standing. Raise your right hand. Face the clerk.

5 THE CLERK: Do you solemnly swear or affirm that
6 the testimony you give to this court shall be the truth,
7 the whole truth, and nothing but the truth so help you God
8 or do you so affirm?

9 THE WITNESS: I do.

10 THE CLERK: Thank you very much. Please be
11 seated.

12 A COURT OFFICER: Please state your name and
13 spell your name for the record.

14 THE WITNESS: Lisa Mattaway, M-A-T-T-A-W-A-Y.

15 A COURT OFFICER: And your employer?

16 THE WITNESS: Bronx County District Attorney.

17 A COURT OFFICER: Thank you.

18 THE COURT: Good afternoon.

19 THE WITNESS: Good afternoon.

20 MS. GOTTLIEB: May I inquire, your Honor?

21 THE COURT: You may inquire.

22 MS. GOTTLIEB: Thank you, your Honor.

23 DIRECT EXAMINATION

24 BY MS. GOTTLIEB:

25 Q. Ms. Mattaway, how long have you been employed by the

People-Mattaway-Direct (Gottlieb)

1 Bronx District Attorney's office?

2 A. About 28 years.

3 Q. And directing your attention to June 2007, were you
4 employed by the Bronx District Attorney's office?

5 A. Yes.

6 Q. And what unit were you in at that time?

7 A. Trial division.

8 Q. And as part of your assignments in 2007, were you
9 assigned to try -- or prior to that, were you assigned to
10 investigate the -- or prosecute the defendant Ricardo Jimenez?

11 A. Yes.

12 Q. And did you actually present the case to the grand
13 jury?

14 A. I did.

15 Q. And in June of 2007, did you actually try that case?

16 A. I did.

17 Q. And was one of the witnesses that you used during that
18 trial an individual by the name of Andrew O'Brien?

19 A. Yes.

20 Q. And prior to putting Andrew O'Brien on the stand, did
21 you make any deals or arrangements with Andrew O'Brien or
22 promises in conjunction with his testimony?

23 A. No. I didn't make a deal.

24 Q. Did you promise to Mr. O'Brien anything?

25 A. He asked for a letter after he testified and then I

People-Mattaway-Direct (Gottlieb)

1 wrote a letter.

2 Q. And prior to Mr. O'Brien testifying at trial, did you
3 tell him you would write a letter?

4 A. I think so. I don't remember.

5 Q. And prior -- and in conjunction with that promise, in
6 June, on June 8, 2007, did you send a letter or your memo to his
7 defense attorney Pat Bruno?

8 A. Yes.

9 Q. And in that email, I'm sorry, in that memo or letter
10 did you explain to Mr. Bruno that you would write a letter?

11 A. Yes.

12 Q. And I'm going to ask you to --

13 MS. GOTTLIEB: Your Honor, prior to the witness
14 being called, there was a stipulation by both parties that
15 People's number one would be moved into evidence without
16 objection. At this time, I'd ask the witness to look at
17 what has been moved into evidence as People's 1.

18 THE COURT: Ms. Heeger?

19 MS. HEEGER: That's correct, your Honor.

20 THE COURT: People's 1 in evidence.

21 THE WITNESS: Yes.

22 Q. And is that the memo or letter you sent to Mr. Bruno?

23 A. Yes.

24 Q. And in that memo did you explain to Mr. Bruno, the
25 entire extent of the promise for the witness Andrew O'Brien?

People-Mattaway-Direct (Gottlieb)

1 A. Yes, I did.

2 Q. And I'm going to direct your attention to June --
3 October 16, 2007. Did you, in fact, write a letter on behalf of
4 Andrew O'Brien?

5 A. Yes.

6 Q. And I'm going to ask you to look at what's been moved
7 into evidence with consent of counsel as People's number two in
8 evidence.

9 THE COURT: Is that correct?

10 MS. HEEGER: Yes, your Honor.

11 MS. GOTTLIEB: Judge, just for the record, the
12 court reporter wrote ID but it's actually in evidence.

13 THE COURT: Okay. We can correct that.

14 Q. Ms. Mattaway, I'm going to ask you to look at People's
15 number two in evidence. Do you recognize that?

16 A. Yes.

17 Q. And what do you recognize that to be?

18 A. This is a copy of the letter that I wrote after the
19 trial.

20 Q. And who's that letter addressed to?

21 A. David Novak.

22 Q. And was that letter the full extent of the promises
23 that you had or the full extent of the promise that you had with
24 Mr. O'Brien?

25 A. Yes.

1 Q. When you told Mr. O'Brien that you'd write a letter,
2 did you tell him any particular language you would use?

3 A. No.

4 Q. Did you show him a copy of that letter prior to him
5 testifying?

6 A. No.

7 Q. And did you make him any promises what the effect of
8 that letter would be?

9 A. No.

10 Q. Did you have any assurances from AUSA Novak about what
11 the effect of that letter would be?

12 A. No.

13 Q. Did you in any way indicate to Mr. O'Brien that you
14 would be able to get him or the promise that -- or the fix had
15 been in for a reduction in sentence?

16 A. No.

17 MS. GOTTLIEB: No further questions.

18 THE COURT: You may inquire.

19 MS. HEEGER: Thank you, your Honor.

20 CROSS-EXAMINATION

21 BY MS. HEEGER:

22 Q. Ms. Mattaway, my name is Anastasia Heeger and I'm one
23 of Mr. Jimenez's attorneys. Thank you for being here this
24 morning. When did you first learn that Andrew O'Brien was a
25 potential witness in the Worrell homicide?

People-Mattaway-Cross (Heeger)

1 A. August of 2006.

2 Q. And before trial, you met once with Mr. O'Brien?

3 A. Yes.

4 Q. And that was in August 2006, about 10, 11 months
5 before the trial, correct?

6 A. Yes, off the top of my head. I'm not counting how
7 many months between August and June, but that's fine.

8 Q. And was this the only time you met with him in person
9 prior to the trial?

10 A. Yes.

11 Q. Now, before this meeting in August 2006, did you ever
12 communicate directly with Mr. O'Brien?

13 A. No.

14 Q. Did you ever communicate with Mr. O'Brien through a
15 third party?

16 A. No.

17 Q. And actually, did you ever speak with Mr. O'Brien on
18 the telephone?

19 A. No.

20 Q. And did Mr. O'Brien ever write to you?

21 A. No.

22 Q. Did you ever write to Mr. O'Brien?

23 A. No.

24 Q. Did he ever email you through the Bureau of Prison's
25 email system?

People-Mattaway-Cross (Heeger)

1 A. No.

2 Q. And have you ever communicated with Mr. O'Brien's
3 family?

4 A. No.

5 Q. With his sister?

6 A. No.

7 Q. Or his daughter?

8 A. No.

9 Q. Did you ever communicate with a lawyer for
10 Mr. O'Brien?

11 A. No.

12 Q. A lawyer named James Nachman?

13 A. No.

14 Q. And before -- strike that. Back to your meeting in
15 August 2006, you went to the federal facility where Mr. O'Brien
16 was incarcerated, correct?

17 A. I don't remember if it was a federal facility. I went
18 to a jail.

19 Q. And who set up this meeting?

20 A. Detective Stradford.

21 Q. And Mr. O'Brien is in the witness security program,
22 correct?

23 A. Yes.

24 Q. So there's special procedures for setting up meetings
25 with him?

People-Mattaway-Cross (Heeger)

1 A. I don't know. I assume so.

2 Q. And at this meeting, how many people were in the room?

3 A. I don't remember.

4 Q. Was Detective Stradford there?

5 A. Yes.

6 Q. Did Mr. O'Brien have an attorney there?

7 A. No, not that I remember. I think Stradford had a
8 partner.

9 Q. Okay. And was there a Bureau of Prisons or prison
10 counselor there?

11 A. No, not that I remember.

12 Q. Was anyone from WITSEC there?

13 A. I have no idea.

14 Q. And an FBI agent?

15 A. I don't remember any of that.

16 Q. And about how long was this meeting in August of 2006?

17 A. I don't remember.

18 Q. And did you have any notes of the conversation?

19 A. No.

20 Q. And is it your practice not to take notes during a
21 witness interview?

22 MS. GOTTLIEB: Objection.

23 THE COURT: I'll allow it. You may answer.

24 A. It's not my practice.

25 Q. Why didn't you here?

People-Mattaway-Cross (Heeger)

1 A. I'm sorry?

2 Q. Why didn't you take notes of this meeting?

3 A. It's not my practice.

4 THE COURT: Sustained.

5 Q. In this meeting in August 2006, is this when you
6 learned that Mr. O'Brien had been writing to a federal judge
7 seeking leniency?

8 A. I don't recall I've ever.

9 MS. GOTTLIEB: Objection.

10 THE COURT: Sustained. Assuming facts not in
11 evidence before this tribunal.

12 Q. Okay. Did Mr. O'Brien mention to you that he was
13 writing letters to a judge seeking leniency?

14 A. I don't recall. No. I don't think so. No.

15 Q. Were you aware?

16 A. No.

17 Q. Of any such arrangement -- or strike that. Were you
18 aware that Mr. O'Brien was writing letters to a federal judge
19 before the trial?

20 A. No.

21 Q. Well, you did write that in an email to an AUSA before
22 trial that you were aware that Mr. O'Brien was writing letters
23 seeking leniency. Do you recall writing that?

24 A. You're asking about August 2006?

25 Q. No. I'm asking about before trial.

People-Mattaway-Cross (Heeger)

1 A. Well then that's a different question.

2 Q. Okay. Well, before trial, were you aware that
3 Mr. O'Brien had been writing letters to a federal judge seeking
4 leniency?

5 A. I don't remember.

6 Q. Would looking at an email that you wrote to Mr. Novak
7 refresh your memory?

8 A. Possibly.

9 MS. HEEGER: Your Honor, I want that marked as
10 Defense A, please, and actually -- this should be in
11 evidence. We received this from the People and it's part
12 of the filings in this case.

13 THE COURT: Is this going into evidence?

14 MS. GOTTLIEB: No objection, Judge.

15 THE COURT: Defendant's A in evidence.

16 (Whereupon, Defendant's Exhibit A is marked into
17 Evidence.)

18 Q. So, I direct you to the second page of the email. It
19 is, I believe, the fourth paragraph down. The third or the
20 fourth paragraphs kind of run into each other, but it's the
21 fourth paragraph down.

22 A. Right.

23 Q. The first --

24 THE COURT: For the purposes of the record, can
25 we have the date of the email and who it was from and to

People-Mattaway-Cross (Heeger)

1 who?

2 MS. HEEGER: These are emails between Lisa
3 Mattaway and AUSA David Novak. There are four emails in
4 this exhibit dated between June, let's see, 4th, 2007 and
5 June 8, 2007.

6 THE COURT: Thank you.

7 Q. Does that refresh your memory as to whether you were
8 aware prior to trial that Mr. O'Brien was writing letters to a
9 federal judge seeking leniency?

10 A. Yes.

11 Q. So were you --

12 MS. GOTTLIEB: Just so the record was clear, that
13 would be the June 4th email --

14 MS. HEEGER: Thank you, counsel.

15 MS. GOTTLIEB: -- on the list.

16 Q. So to be clear, prior to trial you were aware that
17 Mr. O'Brien had been writing letters to a federal judge seeking
18 leniency?

19 A. At that time, yes.

20 Q. Thank you. In the August 2006 meeting, did
21 Mr. O'Brien ask you to write a letter stating that he had -- if
22 in the event that he testified did he -- strike that. In the
23 August 2006 meeting, did Mr. O'Brien ask that in exchange for
24 his testimony you would write a letter for him stating that he
25 testified for the Bronx District Attorney?

People-Mattaway-Cross (Heeger)

1 A. I don't remember the exact words.

2 Q. Did he ask you to write a letter in the 2006 meeting?

3 A. I don't remember.

4 Q. Did he ask for anything in the 2006 meeting?

5 A. I don't remember.

6 Q. When did you agree to write the letter that you spoke
7 about on direct?

8 A. I don't remember.

9 Q. But it was prior to trial?

10 A. Yes.

11 Q. And the understanding was that the letter was going to
12 be for his file, correct?

13 A. Right.

14 Q. And you agreed to write it. Would you agree that a
15 letter from a prosecutor would be a valuable --

16 MS. GOTTLIEB: Objection. I'm going to object to
17 the form of the question. There's a question with no
18 answer and then we go on to would you agree.

19 MS. HEEGER: Okay.

20 THE COURT: Okay. Why don't you start from the
21 beginning?

22 Q. Sure. You agreed to write the letter for the file,
23 correct?

24 A. Yes.

25 Q. Would you agree that a letter from a prosecutor can be

People-Mattaway-Cross (Heeger)

1 a valuable inducement for a witness to testify?

2 MS. GOTTLIEB: Objection.

3 THE COURT: Sustained as to the form of the
4 question.

5 Q. When you agreed to write the letter for the file, what
6 was your understanding of what the file was?

7 A. I don't have any understanding.

8 Q. Well, did you know who the letter was going to be
9 addressed to?

10 A. No.

11 Q. Did you ask who it was going to be addressed to?

12 A. No. I'm not sure what you're talking about.

13 Q. When Mr. O'Brien asked for a letter for his file and
14 you agreed to write the letter, what was your understanding of
15 what the file was?

16 A. I don't have any understanding.

17 Q. And I'm asking you, did you know who the letter was
18 going to be addressed to?

19 A. No.

20 Q. Did you ask who the letter was going to be addressed
21 to?

22 A. No.

23 Q. Did you ask what it was going to be used for?

24 A. No.

25 Q. Did you care what it was going to be used for?

People-Mattaway-Cross (Heeger)

1 A. No.

2 MS. GOTTLIEB: Objection.

3 THE COURT: Overruled.

4 Q. Well, did Mr. O'Brien have unlimited authorization to
5 use this letter for any purpose that he wished?

6 MS. GOTTLIEB: Objection.

7 THE COURT: Rephrase the question.

8 Q. In giving the letter to Mr. O'Brien, could he have
9 used the letter for, say, a clemency petition?

10 MS. GOTTLIEB: Objection.

11 THE COURT: Overruled.

12 MS. HEEGER: Well, your Honor, I'm trying to get
13 a sense of when ADA Mattaway agreed to give the letter were
14 there any restrictions on what he would use this letter
15 for. Was it just a blank check?

16 MS. GOTTLIEB: Objection.

17 THE COURT: Okay. See, this is the problem you
18 have. Could he -- how is she supposed to know how to
19 answer that question?

20 MS. HEEGER: Your Honor, I'm not --

21 THE COURT: Anything is possible. I understand
22 what you're trying to get. I'm just so -- I'm not really
23 restricting what you're trying to get at, it's just that
24 the phraseology, it could mean almost anything. That we
25 cannot have.

People-Mattaway-Cross (Heeger)

1 MS. HEEGER: Understood, your Honor.

2 Q. When you agreed to write the letter, did you put any
3 restrictions on what the letter could be used for?

4 MS. GOTTLIEB: Objection.

5 THE COURT: Overruled.

6 A. It wasn't a thank you letter to Mr. O'Brien. So your
7 question about restrictions and things, I didn't write this
8 letter to Mr. O'Brien.

9 Q. I understand that. It was for the file, correct?

10 A. The letter was to the AUSA.

11 Q. So, when you agreed to write the letter, the
12 understanding was that the letter was to the AUSA? Did I
13 understand that correctly?

14 A. No. That's not the understanding. There's no
15 understanding.

16 Q. On direct you spoke about the June 8, 2007 memorandum
17 that you wrote to Mr. Bruno?

18 A. Right.

19 Q. And you said that you wrote a letter to the file?

20 A. I wrote a letter in response to the request by AUSA
21 David Novak post trial confirming that Mr. O'Brien testified for
22 me. That's what I wrote.

23 Q. Are you talking about in June -- on June 8, 2007 which
24 is the subject of People's Exhibit 1?

25 A. Right.

People-Mattaway-Cross (Heeger)

1 Q. The disclosure to defense counsel --

2 A. Right.

3 Q. -- discusses a letter to be written to the file?

4 A. It says has asked for a letter to be prepared by the
5 undersigned. That's me.

6 Q. Correct.

7 A. That he can put in his file or have put in his file.

8 Q. Okay. And I am asking that when that disclosure was
9 made.

10 A. Right.

11 Q. Was the understanding that the letter was going to be
12 written to the AUSA?

13 A. I don't remember. I don't know. I don't remember.

14 Q. Okay. Thank you.

15 A. I think so.

16 Q. Thank you. Now, when you discussed writing the letter
17 with Mr. O'Brien, you were aware that Mr. O'Brien had already
18 received a sentence reduction in his case, correct?

19 A. No. That's two parts to your question too. I have no
20 recollection of discussing with Mr. O'Brien anything about a
21 letter.

22 Q. I'm sorry. Could you repeat that?

23 A. I have no recollection of discussing with Mr. O'Brien
24 anything about a letter. My recollection is and my focus was
25 his trial testimony. Still is.

People-Mattaway-Cross (Heeger)

1 Q. So, on June 8, 2007 when you wrote that memo to
2 defense counsel.

3 A. Right.

4 Q. Talking about writing a letter to the file.

5 A. Right.

6 Q. When did you agree to write the letter to the file?

7 A. Probably back in August of '06, but I don't remember.

8 Q. Ms. Mattaway, do you recall writing an affirmation in
9 connection with this case?

10 A. Yes.

11 MS. HEEGER: Your Honor, I'd like to ask that
12 this be marked as Defendant's B and also admitted into
13 evidence as part of one of the filings in this case.

14 THE COURT: Any objections?

15 MS. GOTTLIEB: No objection, Judge.

16 THE COURT: Defendant's B in evidence.

17 (Whereupon, Defendant's Exhibit B is marked into
18 Evidence.)

19 Q. Now, Ms. Mattaway, on page 14, the third line down,
20 you wrote that according to your notes O'Brien had already
21 received leniency from the federal government in the form of a
22 sentence reduction and he only wanted a letter from me.

23 A. That's what I wrote.

24 Q. So, when you agreed to write the letter, you were
25 aware that he had already received a sentence reduction?

People-Mattaway-Cross (Heeger)

1 A. That's what it says.

2 Q. Thank you. And Ms. Mattaway, when you mentioned that
3 a reference according to your notes, what notes are you
4 referring to?

5 A. Probably my diary.

6 Q. And how did you learn that O'Brien had already
7 received a sentence reduction?

8 A. I don't know. I don't remember.

9 Q. Did you learn it in a conversation with AUSA Novak?

10 A. I don't remember.

11 Q. Did Detective Stradford tell you?

12 A. I don't remember.

13 Q. Now, you testified earlier that you had joined the
14 Bronx D.A.'s office about 28 years ago. That's about 1989,
15 right?

16 A. Actually it's 29 years. I started in '88.

17 Q. And so by 2007, you had been in the office for about
18 18 years, correct?

19 A. I guess.

20 Q. Okay. Pretty experienced.

21 A. At the time.

22 Q. And as part of your job as an experienced prosecutor,
23 you interacted with federal prosecutors, correct?

24 A. No.

25 Q. You had no interaction with federal prosecutors at

People-Mattaway-Cross (Heeger)

1 that point?

2 A. I think this is my first time ever.

3 Q. Okay. So prior to trial, you were aware that
4 Mr. O'Brien had resolved the case that he was serving time on
5 about ten years prior to that, correct?

6 A. No. I don't know anything about his other case. I
7 don't remember.

8 Q. But you were aware that he had a sentence reduction in
9 the case?

10 A. Well, that's what it says on the affirmation.

11 Q. Well, you were aware he was in federal custody,
12 correct?

13 A. Yes.

14 Q. Okay. So you were aware he had a federal conviction?

15 A. I don't -- like I guess -- I don't know if he had
16 anything open. I don't know. I don't think so.

17 Q. Well, I asked were you aware that he had a federal
18 conviction?

19 A. Right, but you're saying that that's the only thing he
20 had. I don't know what else, if anything, he had.

21 Q. No. I'm just asking about the case that he was
22 serving time on.

23 A. Okay.

24 Q. And so you were aware he had a federal conviction?
25 You were aware that he -- and you were aware he had a sentence

People-Mattaway-Cross (Heeger)

1 reduction in that case, correct?

2 A. Yes.

3 MS. GOTTLIEB: Objection. Time frame.

4 MS. HEEGER: Prior to trial.

5 THE COURT: She's answered it. Move on.

6 Q. And you were also aware prior to trial that he was
7 writing letters seeking leniency, correct?

8 A. Yes, at some point.

9 Q. So, as an experienced prosecutor, you would need to do
10 some due diligence into this witness, correct?

11 A. I don't know what you mean. I have no idea what you
12 mean.

13 Q. Well, you knew he was seeking leniency?

14 A. You've asked me that.

15 Q. Okay. And were you going to inquire into the basis
16 for this?

17 MS. GOTTLIEB: Objection.

18 THE COURT: Sustained.

19 MS. HEEGER: Okay. I can move on.

20 Q. On June 4, 2007 you emailed AUSA David Novak in the
21 District of Virginia, correct?

22 A. Yes.

23 THE COURT: All right. I assume you have a lot
24 more to go.

25 MS. HEEGER: I do, your Honor.

People-Mattaway-Cross(Heeger)

1 THE COURT: All right. We're going to break at
2 this time. It's almost ten to one.

3 MS. HEEGER: Okay.

4 THE COURT: We'll pick this up after lunch. You
5 may step down.

6 THE WITNESS: Thank you.

7 * * * * *

8 A F T E R N O O N S E S S I O N

9 (Whereupon, the witness resumes the stand.)

10 THE CLERK: Come to order. Judge, this is
11 recalling number one on the calendar, indictment 3825 of
12 2006, Ricardo Jimenez. This is a hearing continued. ADA
13 Mattaway, I remind you, you remain under oath.

14 THE COURT: Before we begin, is there anything
15 either side needs to address for the record?

16 MS. HEEGER: No, your Honor.

17 THE COURT: Okay. You may proceed.

18 MS. HEEGER: Thank you, your Honor.

19 Q. ADA Mattaway, I believe my last question was that on
20 June 4, 2007 you emailed AUSA David Novak, correct?

21 A. Yes.

22 Q. And this was about three weeks before Mr. Jimenez's
23 trial?

24 A. Right.

25 Q. And you asked Mr. Novak for any cooperation agreements

People-Mattaway-Cross (Heeger)

1 that he had made with Mr. O'Brien, yes?

2 A. I asked for any cooperation agreements he has made,
3 not necessarily with the AUSA.

4 Q. Were you asked for any cooperation agreements he made
5 in exchange for O'Brien's testimony in the federal case?

6 A. For his testimony with the federal government. I
7 don't know what else he had with the federal government, if
8 anything.

9 Q. And you asked for any information regarding favorable
10 treatment O'Brien may have received in exchange for cooperation?

11 A. That's right.

12 Q. And you asked that if any of the letters mentioned the
13 possibility that he may testify in your case you wanted those
14 letters too?

15 A. Right.

16 Q. Now, Andrew O'Brien wasn't the first cooperator you
17 worked with?

18 A. He might have been.

19 Q. Well, you would agree that a critical part of being a
20 prosecutor is to vet your potential witnesses?

21 MS. GOTTLIEB: Objection.

22 THE COURT: Sustained. Next question.

23 Q. Well, you were trying to find out about his deal with
24 the federal government?

25 A. No.

People-Mattaway-Cross (Heeger)

1 Q. Well, you recognize that there was a possibility that
2 O'Brien would mention his testimony for you in his letters to
3 the federal judge?

4 A. Whatever it said in the email. It's in evidence.
5 Defense A.

6 Q. Well, is it fair to say that you recognize that Andrew
7 O'Brien might have cited his cooperation in your case --

8 MS. GOTTLIEB: Objection.

9 THE COURT: Finish your question, please.

10 Q. You recognize that Andrew O'Brien might have cited his
11 cooperation in your case as support for his efforts to get a
12 sentence reduction?

13 MS. GOTTLIEB: Objection.

14 THE COURT: At what point in time?

15 MS. HEEGER: When this email was written.

16 THE COURT: Overruled.

17 A. He hadn't testified yet. I didn't consider him
18 cooperating.

19 Q. Well, you made a pretty specific request of the ADA.

20 A. Right.

21 Q. And you asked if any of these letters requesting
22 leniency mentioned your case?

23 A. Right. It would be potential cooperation. He hasn't
24 done it yet.

25 Q. Well --

People-Mattaway-Cross (Heeger)

1 A. When I sent this email.

2 Q. Correct. But you would be -- but you were asking if
3 he was mentioning to the federal judge in his efforts to get
4 leniency that he was cooperating with you?

5 A. Again, about to cooperate. I don't know if he would
6 mention a future potential for testimony.

7 Q. Okay. But at the time you wrote this email.

8 A. Right.

9 Q. You were aware that there was a possibility that
10 O'Brien might be mentioning his potential cooperation with you
11 to the federal judge?

12 A. Yeah. Anything's possible. Yes.

13 Q. So, the --

14 A. It's a possibility.

15 Q. So, the time you write in the email you know you're
16 writing a letter, correct?

17 A. A letter?

18 Q. That you had promised O'Brien a letter for his file?

19 A. At the time I'm writing the email to AUSA Novak?

20 Q. Correct, on June 4, 2007.

21 A. It doesn't mention anything about that.

22 Q. Well, I'm asking your recollection. At the time that
23 you wrote this email to him.

24 A. Right.

25 Q. Had you agreed to write the letter for O'Brien?

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1 A. I don't remember.

2 Q. Well, you mention the letter in your June 8, 2007
3 memorandum to Patrick Bruno four days later?

4 A. That's right.

5 Q. So did the agreement to write the letter come before
6 the O'Brien -- I mean, strike that. Before the email to Novak
7 or after the email to Novak?

8 A. I don't know.

9 Q. But you are aware that O'Brien is seeking further
10 sentencing leniency?

11 A. When?

12 Q. When you write the email.

13 A. I don't -- I don't know. I don't know. What did I
14 write? I don't -- I don't know. I wrote this at 4:06. I don't
15 know when I was aware he was seeking further leniency. I don't
16 know when.

17 Q. Well, my question was when you wrote to AUSA Novak in
18 this email, I am aware that O'Brien has written numerous letters
19 to the judge in this case requesting leniency.

20 A. Right. I don't know where I got that information
21 from.

22 Q. Okay. I'm just confirming that you were aware he was
23 seeking leniency when you wrote the email.

24 A. Yeah. I mean, if it's in the email, but I don't know
25 when.

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1 Q. Thank you. Now, prior to sending that email, you had
2 a telephone conversation with Mr. Novak?

3 A. I think so. I don't remember.

4 Q. You refer to it in the first?

5 A. Right. I don't have any independent recollection.

6 Q. And other than this call that you reference in the
7 email, did you have any additional telephone calls with
8 Mr. Novak prior to this?

9 A. I don't recall.

10 Q. And a few days after you sent the June 4th email, AUSA
11 Novak sent you the materials you requested, correct?

12 A. That's what he said in his email.

13 Q. And this material was received on or about June 13th,
14 correct?

15 A. I don't know when my office received it.

16 Q. Okay. Would an email help to refresh your
17 recollection?

18 A. Possibly. I don't know.

19 MS. HEEGER: I'd ask that that be marked as --

20 THE COURT: I believe C.

21 MS. HEEGER: -- Defendant's C, please. And
22 again, we would ask that this be admitted into evidence as
23 part of the materials, separate files by the People in this
24 case.

25 THE COURT: Any objection?

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1 MS. GOTTLIEB: Separate? No problem, Judge.

2 THE COURT: Can I see it, please? Are you
3 referring to a specific email here? The bottom one or the
4 middle one?

5 MS. HEEGER: It's actually the middle one.

6 THE COURT: All right. Defendant's C in
7 evidence, a two-page document containing a number of email
8 correspondence at this point in time, specific reference
9 being made to the second one which would be an email from
10 Ms. Mattaway to Mr. Novak dated 2/13/2007. Is that
11 correct?

12 MS. HEEGER: Correct, your Honor.

13 THE COURT: Okay.

14 (Whereupon, Defendant's Exhibit C is marked into
15 Evidence.)

16 THE WITNESS: Okay.

17 Q. So, these materials were received by your office on or
18 about June 13, 2007?

19 A. I wrote got the packet. It must be that. I assume
20 that's what it is.

21 Q. And in the package of materials that AUSA Novak sent
22 you, this included letters that O'Brien had written to the judge
23 in 2006 and 2007?

24 A. I have no independent recollection of what was in
25 anything.

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1 MS. HEEGER: Your Honor, I'd ask this be marked
2 as Defendant's D, and I have a copy for the Court also.
3 And I request that this be admitted into evidence as a
4 document received from the district attorney.

5 THE COURT: Any objection?

6 MS. GOTTLIEB: No objection.

7 THE COURT: Defendant's D in evidence, two-page
8 letter dated June 8, 2007 from Mr. Novak addressed to
9 Ms. Mattaway. Mark it, please.

10 (Whereupon, Defendant's Exhibit D is marked into
11 Evidence.)

12 Q. So, my last question was, the packet that he sent you
13 included letters from Mr. O'Brien to the federal judge from 2006
14 and 2007?

15 A. That's what the letter from AUSA Novak says but I have
16 no independent recollection.

17 Q. Okay. And it also included his 1997 plea agreement?

18 A. I don't know the date of his plea agreement.

19 Q. Okay. It included the 1998 order reducing his
20 sentence?

21 A. It says that in the letter from Novak.

22 Q. Okay. And it included the 32-page FBI 302 detailing
23 the information that he gave to investigators?

24 A. That's what his letter says.

25 Q. And did you look at any of this material?

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1 A. I don't remember.

2 Q. In your affirmation you stated that you did not look
3 at the material because you were busy after having returned from
4 vacation.

5 A. Probably. That's right.

6 Q. And none of this material was turned over to the
7 defense?

8 A. I can't say that. I disagree with that. Pat Bruno
9 cross-examined the defendant on material that was specifically
10 in this. I just don't have any notes as to when it got to him,
11 unfortunately.

12 Q. In your affirmation, you stated that you had
13 inadvertently neglected to look at and disclose the documents
14 that the AUSA sent you?

15 A. That's what it says.

16 Q. So you did not disclose the documents?

17 A. Again, I don't remember what I did or didn't do.

18 Q. Did you know whether it was this affirmation?

19 THE COURT: As to clarity, you're referring to
20 what's now Defendant's B in evidence.

21 MS. HEEGER: Correct, your Honor. Defendant's B
22 in evidence. I'm referring to page 12 of Ms. Mattaway's
23 affirmation, six lines from the bottom.

24 A. I said I must have inadvertently neglected to look at
25 and disclose the documents. Yes, that's what I wrote in there.

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1 Q. Okay. So you neglected to disclose the documents to
2 defense counsel?

3 MS. GOTTLIEB: Objection.

4 A. That's not what it says. It says I have no
5 independent recollection of what I did with these materials.

6 Q. Where --

7 A. I still don't.

8 Q. When you wrote I must have inadvertently neglected to
9 look at and disclose the documents that the AUSA had given me.

10 A. Right because that was the allegation that I didn't do
11 it, but I remember Mr. Bruno cross-examining the witness about
12 materials that were in there. So, I don't know how else he
13 would have gotten them if I didn't turn it over.

14 Q. Well, if you didn't look at them, how did you turn
15 them over?

16 MS. GOTTLIEB: Objection.

17 A. I had -- I don't know.

18 THE COURT: Sustained.

19 A. I don't know.

20 Q. I'm trying to understand what you meant when you wrote
21 I must have inadvertently neglected to look at and disclose the
22 documents.

23 A. Correct. I know what you're asking. I had a second
24 seat. I don't remember. I'm telling you I don't remember
25 myself personally doing it, but I don't have a memory of it.

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1 Q. But when you wrote this affirmation --

2 A. Right.

3 Q. -- doesn't this affirmation say that you neglected to
4 look at and to disclose them?

5 MS. GOTTLIEB: Objection, Judge. I think the
6 affirmation speaks for itself and it specifically says what
7 it says.

8 THE COURT: Sustained.

9 MS. GOTTLIEB: You can't change the words.

10 THE COURT: Sustained.

11 MS. GOTTLIEB: Thank you.

12 Q. Ms. Mattaway, you turned over a number of detailed
13 discovery receipts in this case?

14 A. I don't remember. I'm sure I did.

15 MS. HEEGER: I'd like this marked as Defense E.

16 MS. GOTTLIEB: Judge, I'm going to object to
17 this. This was all argued before the Appellate Division.
18 This argument was specifically rejected. This is not the
19 basis of this hearing. What was turned over and what
20 wasn't turned over was litigated and decided by the
21 Appellate Division. The Appellate Division then went on to
22 limit this hearing to a very narrow area and this isn't
23 part of it.

24 THE COURT: Do you wish to respond?

25 MS. HEEGER: Your Honor, this is a critical part

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1 of this. What I'm trying to ascertain from the witness is
2 A, whether the materials were looked at and whether they
3 were turned over because as was stated here there's been
4 the suggestion that no Brady violation occurred because
5 this material may have been turned over to defense counsel
6 and I'm trying to explore this allegation that they may
7 have been turned over to defense counsel.

8 THE COURT: Well, it appears to me that if you
9 refer to the decision of the Appellate Division as cited
10 before, I believe it's page 160, beginning of what's known
11 as 14, we'll call it 14. The Appellate Division did not
12 take that position. Quoting that first line, we agree with
13 the motion course that none of these materials having been
14 made available before the trial had a reasonable
15 possibility of changing the -- well, then it goes on, but I
16 believe that's what the objection is fundamentally based
17 on. It seems kind of clear that they -- that's not the
18 position or roughly it is. I mean, if you have an
19 additional offer of proof, I'll listen, but just keep in
20 mind I'm not in a position to overrule the Appellate
21 Division.

22 MS. HEEGER: Your Honor, may I approach?

23 THE COURT: Sure.

24 (Whereupon, the following discussion takes place
25 on the record, at the sidebar, in the presence of the

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1 Court, the assistant district attorneys, and both defense
2 counsel:)

3 MS. HEEGER: Your Honor, our position is that the
4 materials that were in this envelope gave the necessary
5 context and information to understand the value of the
6 letter; that he was seeking a sentence reduction, the
7 mechanism by which he could receive a sentence reduction.
8 Those are critical to understanding the value of the
9 letter. If the letter had been turned over to defense
10 counsel, we could have explored this. So when Andrew
11 O'Brien testified to receiving the letter, he could have
12 asked him about the letters that he had been writing
13 seeking leniency. He could have asked him after already
14 receiving a sentence reduction. He could have been aware
15 that Mr. O'Brien was in a jurisdiction and was under a plea
16 agreement where he had gotten a certified sentence
17 reduction before. So, exploring what was in this package
18 and whether or not it was A, what the prosecutor looked at
19 and B, whether or not it was turned over to defense counsel
20 is critical. And the People have said in response that, as
21 Ms. Mattaway did just now that those materials may have
22 been turned over to defense counsel so no Brady violation
23 lies because maybe he had the material. It seems that
24 actually he did not have the material.

25 MR. CHAMOY: Well, I do have to say something to

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1 correct what was just represented because I handled the
2 appeal. The People's position was always that the only one
3 that we disputed was the matter of the plea agreement and
4 otherwise there was no record evidence that we could
5 support that would state that the other materials that were
6 in the packet had been turned over, but the facts that
7 Patrick Bruno had placed on the record in terms of his
8 cross-examination suggested an intimate knowledge of facts
9 that were potentially elicited from the underlying
10 cooperation slash pre-agreement. That was the only one
11 that was disputed.

12 MS. HEEGER: Your Honor, I don't think that's a
13 fair characterization of the cross-examination.
14 Mr. O'Brien was barely questioned at all about his plea
15 agreement with the feds.

16 MR. CHAMOY: Well, we're not here to debate
17 what's in the cross-exam. We're here to discuss what was
18 and what wasn't disputed when you're trying to go into
19 every document and go into a lengthy examination when it's
20 not at issue to this hearing.

21 THE COURT: This document is in evidence. It
22 will be weighed. However this area, your argument, is
23 fundamentally asking me to overrule the Appellate Division
24 and as much as, I'll probably pay for this statement, as
25 much as I would like to do that on occasion, I refrain from

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1 that. So, it is in evidence and I think some of this is
2 more appropriate perhaps for your argument than it is for
3 just going over the stuff and just denying it when I
4 believe the Appellate Division already ruled on this.
5 Their ruling in sending this matter for a hearing has
6 extremely narrow parameters. That's not to undermine the
7 complexity of the issue within those parameters, but I
8 still have those parameters.

9 MS. HEEGER: Your Honor, may I respond?

10 THE COURT: Sure.

11 MS. HEEGER: The first thing I wanted to note is
12 it is correct that the Appellate Division denied our claims
13 involving some of the items that were in the packet. For
14 example, one of the Brady claims that was asserted was that
15 the 302 not being disclosed deprived defense counsel of
16 questioning him on that. That is not why I'm asking this.
17 I am asking about the materials that go to his plea
18 agreement, to things that go to the matter of sentencing,
19 Brady and sentence reduction. I do not believe that that
20 was covered by the Appellate Division's decision on that
21 and is a part of this hearing because --

22 THE COURT: I don't mean to cut you off, but I
23 think I made it clear. I'm not reading the Appellate
24 decision with a broad brush. Okay? I think they made a
25 very direct statement as to why they were sending him back.

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1 Okay? And I'm going to hold you to it in those parameters.

2 MS. HEEGER: Understood, your Honor. May I make
3 one other remark about the scope of the hearing? Your
4 Honor, when -- I think as we noted at the beginning of the
5 proceedings that the Appellate Division did give some
6 rather disrate instructions in its opinion. As you are
7 aware, we filed a motion to reargue and one of the reasons
8 that we did is we anticipated that there might be some
9 confusion about the scope of the hearing here and in the
10 response to the motion to reargue, the People represented
11 that there was no confusion because and particularly cited
12 the case People v. Novoa as saying understandably that
13 would be the standard that this court reviews. Now, the
14 standard in People v. Novoa is that there -- if there's any
15 kind of understanding between the parties and I think that
16 that is what we need to be looking at here. If there's any
17 understanding between the parties and I have a --

18 MR. CHAMOY: But none of your questions go to
19 that issue. Not one of the questions.

20 THE COURT: You're not going to under an
21 understanding between the parties, and so I'm clear I made
22 a reference that what you're disputing lies in a decision.
23 They don't seem to line up exactly. Okay? You cannot read
24 those independently of each other. You have to read the
25 decision as a whole and the underlying reasoning for the

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1 ruling. Okay? And that's where the strict parameters come
2 in. It's not that there's two really different statements
3 in there. If you look at them separately they don't
4 exactly line up, but that's not the way we have to read it.
5 We have to read it as an entire decision, an entire line of
6 reasoning and what led to this conclusion. You are
7 correct. The understanding between the parties is an
8 issue. This line of questioning and getting into this is
9 not taking us there. And again, some of this, how you want
10 to relate it to this, is more appropriate for argument than
11 it is for examination.

12 MS. HEEGER: Thank you, your Honor.

13 (Whereupon, the following takes place in open
14 court:)

15 THE COURT: For the record, the objection's
16 sustained. Next question.

17 MS. HEEGER: Okay.

18 Q. I want to move on to the June 8th memorandum which is
19 in evidence as People's Exhibit 1.

20 A. Right.

21 Q. And on June 8, 2006, you wrote the memorandum to
22 Patrick Bruno.

23 A. Right.

24 Q. And in this memo you noted that Mr. O'Brien had asked
25 for a letter to be prepared by the undersigned to be put in his

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1 file.

2 A. Right.

3 Q. And you wrote this letter to fulfill your Brady/Giglio
4 obligations?

5 A. I don't know if Giglio was a case back then, but Brady
6 was.

7 Q. And in this memorandum, did you mention that
8 Mr. O'Brien had been writing letters to the federal prosecutor?

9 MS. GOTTLIEB: Objection. I think it speaks for
10 itself, Judge.

11 THE COURT: Sustained.

12 Q. Why did you not put the information about Mr. O'Brien
13 seeking leniency in this memorandum?

14 A. He wasn't seeking it from me.

15 Q. But he was seeking it from the federal judge?

16 A. Look, the only thing he wanted from me was a letter
17 after he testified and that's what he got.

18 Q. But you were aware that he was seeking leniency in his
19 case, correct?

20 A. That was in the June 4th --

21 MS. GOTTLIEB: Objection.

22 A. I guess. In his -- but I don't know again what he was
23 doing with the federal government.

24 THE COURT: If there's an objection, you
25 shouldn't be talking.

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1 THE WITNESS: I'm sorry, Judge.

2 THE COURT: Only as to the actual phraseology to
3 your question, I'm going to sustain the objection. I'm not
4 sustaining it as to the heart of what you're trying to get
5 to.

6 Q. Okay. Why did you not tell the defense that
7 Mr. O'Brien was seeking leniency?

8 A. Again, I don't know or don't remember what the extent
9 of what he wanted federally was. What's in this memo dated June
10 8th is what it says, what he wants from me.

11 Q. But I'm asking you why you did not include that
12 Mr. O'Brien was seeking leniency from the federal judge?

13 A. I didn't include it in this memo. That doesn't mean
14 it wasn't disclosed.

15 Q. Do you have any memory of disclosing that information?

16 A. No, not independently. It's been ten years.

17 Q. Do you agree that the defense should have been
18 informed of that information?

19 MS. GOTTLIEB: Objection.

20 THE COURT: Sustained.

21 Q. Ms. Mattaway, as a prosecutor you've had training on
22 Brady and Giglio, correct?

23 A. Like throughout my whole career? Yeah.

24 Q. Correct. And would you agree that impeachment
25 evidence that undermines a witness's credibility needs to be

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1 disclosed?

2 MS. GOTTLIEB: Objection.

3 THE COURT: Sustained. Whether a Brady violation
4 or not in this case is for the Court to determine based on
5 the evidence presented to the Court, not the opinion of any
6 particular witness or party.

7 MS. HEEGER: Your Honor, if I may. Ms. Mattaway
8 has asserted in her affirmation that she made the
9 appropriate disclosures in the June 8, 2006 memorandum and
10 what I'm trying to ascertain is her understanding of what
11 Brady and Giglio requires.

12 THE COURT: But it's not based on her. It's
13 based on what really happened.

14 MS. HEEGER: Well, it goes to her decision-making
15 in what she's decided to disclose and to not disclose.

16 THE COURT: It's not based on her
17 decision-making. It's based on what knowledge she had, if
18 any, based on whether there was an agreement, the
19 parameters of that agreement, what she was aware of, and
20 how that impacted on your client, not based on what her
21 thinking was or understanding. If she thought she did
22 something totally correct but the record is still it
23 wasn't, there's still a Brady violation.

24 MS. HEEGER: Correct, your Honor.

25 THE COURT: So, her opinion doesn't matter in

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1 this. Meaning no disrespect to the witness.

2 Q. So Mr. Novak contacted you again on October 1, 2007?

3 A. I don't remember the exact date, but I'm sure it's in
4 the material somewhere here.

5 Q. You address it in your affirmation.

6 A. Yes. Page 14. I see it.

7 Q. And did he call you or did he email you?

8 A. I don't think he emailed me. I think if he emailed me
9 it would have been -- you know, you would have had it.

10 Q. And he asked you about Mr. O'Brien's cooperation in
11 this case?

12 A. I don't remember what he asked me specifically.

13 Q. In your affirmation you said that on October 1st AUSA
14 Novak contacted me regarding Mr. O'Brien's cooperation?

15 A. Right.

16 Q. And then four days later he asked you to write a
17 letter about this cooperation?

18 A. Right.

19 Q. And did you ask what the letter was for?

20 MS. GOTTLIEB: Objection.

21 THE COURT: I'll allow that question.

22 A. No.

23 Q. But you understood that this was the letter that
24 Mr. O'Brien had earlier requested?

25 MS. GOTTLIEB: Objection.

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1 MS. HEEGER: Your Honor, this goes --

2 THE COURT: -- as to the form of the question.

3 MS. HEEGER: -- to the heart of the hearing.

4 THE COURT: As to the form of the question.

5 Q. The letter that Mr. Novak requested of you.

6 A. Right.

7 Q. Was the letter that Mr. O'Brien had asked you to write
8 for him, correct?

9 A. Right. But again, I don't know that the request came
10 from Mr. O'Brien himself. You keep saying that he asked me.

11 Q. Okay. So, where did you -- where did the request for
12 the letter come from?

13 A. I think it came from Novak.

14 Q. So I understand your testimony.

15 A. Okay.

16 Q. The request for a letter.

17 A. Right.

18 Q. Came from Novak?

19 A. I don't remember. That's my point.

20 Q. But, okay. How about the request for a letter came
21 prior to June 8, 2007?

22 MS. GOTTLIEB: Judge, I'm going to object to this
23 line of questioning.

24 MS. HEEGER: Your Honor, this is the heart of the
25 hearing.

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1 THE COURT: I understand that, but the way you're
2 asking a question and we keep jumping around dates is
3 creating an unclear record. That's my problem. I want the
4 record to be very clear. So, correct me if I'm wrong.
5 You've already testified that sometime before the trial,

6 THE WITNESS: Yes.

7 THE COURT: You had a conversation with
8 Mr. O'Brien. He just asked you to write a letter for him.
9 Is that fair and accurate?

10 THE WITNESS: Now I'm not sure if he asked me or
11 if it was Novak.

12 THE COURT: Okay. But somebody talked to you
13 about doing a letter before the trial?

14 THE WITNESS: On June 4th.

15 THE COURT: Okay. And then --

16 THE WITNESS: Because I -- I'm sorry, Judge.

17 THE COURT: And then after the trial.

18 THE WITNESS: Right.

19 THE COURT: You were contacted with regards to
20 the letter?

21 THE WITNESS: Right.

22 THE COURT: Was that the same letter or a
23 different letter?

24 THE WITNESS: No. The same letter.

25 THE COURT: Okay. And who was the person that

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1 contacted you after the trial?

2 THE WITNESS: Novak.

3 THE COURT: Okay. Proceed.

4 Q. And 11 days after your conversation with Mr. Novak,
5 you wrote the letter for Mr. O'Brien?

6 A. I don't know if it's 11 days, but.

7 MS. HEEGER: Okay. I believe the letter is
8 People's 2.

9 THE COURT: The point being after you had that
10 conversation you wrote the letter, correct? Correct?

11 THE WITNESS: Right. Yes.

12 THE COURT: Next question.

13 MS. GOTTLIEB: Letter's dated October 16th for
14 the record.

15 THE WITNESS: My letter's dated October 16th. I
16 don't know if that's 11 days.

17 THE COURT: It's in evidence. It speaks for
18 itself.

19 Q. And Andrew O'Brien called you that morning of October
20 16th?

21 A. I have no recollection of that.

22 Q. Page two of the letter, would that refresh your
23 recollection?

24 A. Okay. That's what it says.

25 Q. And he was calling to check up on his letter, correct?

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1 MS. GOTTLIEB: Objection.

2 THE COURT: I'll allow that question.

3 A. Whatever I wrote is what happened.

4 Q. And Mr. O'Brien called you directly?

5 A. I don't know if he called the main number and got
6 transferred to me.

7 Q. Is that the first time he called you?

8 A. Yes. I don't recall ever speaking with him.

9 Q. Do you remember any of the subject of your
10 conversation?

11 A. No. Well, whatever it says I wrote in the letter.

12 Q. He expressed he wanted to work for you as a jailhouse
13 informant?

14 MS. GOTTLIEB: Objection.

15 MR. CHAMOY: Objection.

16 MS. GOTTLIEB: Now we're talking about the
17 letter. Judge, I think the letter speaks for itself and
18 I'd ask her not to paraphrase it. If she wants to quote
19 the letter, quote the letter.

20 THE COURT: Sustained, as to that. It's
21 sustained. Move on.

22 Q. So, you wrote that just this morning Mr. O'Brien
23 telephoned me from jail to tell me he had chatted up another
24 inmate who has some information on two old Bronx homicide cases.
25 Did you write that?

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1 A. That's what I wrote.

2 Q. Okay. And in this letter, you also urged AUSA Novak
3 to give him whatever consideration he could in his position,
4 correct?

5 A. Whatever I wrote, that's --

6 MS. GOTTLIEB: Paragraph, please.

7 MS. HEEGER: The second paragraph on the second
8 page of the letter, the first line.

9 Q. You wrote I urge you to give Mr. O'Brien whatever
10 consideration you can in your position.

11 A. Right.

12 Q. So you were advocating for Mr. O'Brien?

13 MS. GOTTLIEB: Objection.

14 THE COURT: I'll allow that question.

15 A. I wrote a letter.

16 Q. Well, this was more than just a general advisement
17 that he had testified for you?

18 A. I consider advocating on your feet in court like
19 you're doing. I wrote a letter. What Mr. Novak did with it, I
20 don't know.

21 Q. So you wrote the letter on October 16, 2007 and then
22 AUSA Novak emailed you on November 26, 2000 asking about the
23 letter?

24 A. Yes.

25 Q. And he said that he hasn't yet received it from you?

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1 A. Right.

2 Q. And that he wanted to make a decision by Christmas as
3 to whether to give Mr. O'Brien a sentence reduction?

4 A. That's what it says in his communication.

5 Q. Did you respond you didn't know what he was talking
6 about?

7 A. My response, I believe, is in the record some place.
8 I think I sent a letter saying here it is.

9 Q. Because you understood that this was for a sentence
10 reduction?

11 MS. GOTTLIEB: Objection.

12 A. No, I did not.

13 THE COURT: Well, she's answered it already.

14 Q. What was your understanding of your Brady/Giglio
15 obligations at this point?

16 MS. GOTTLIEB: Objection.

17 THE COURT: Sustained.

18 Q. Well, you had represented to this court and defense
19 counsel that you were writing a letter for a file and now the
20 letter you know is now for sentence reduction?

21 MS. GOTTLIEB: Objection.

22 A. I do not know that. I did not know that.

23 THE COURT: Stop. Objection to that last
24 question's sustained. Next question.

25 Q. So I understand your testimony, did you believe that

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1 you had an obligation to tell the defense the purpose of the
2 letter?

3 MS. GOTTLIEB: Objection.

4 THE COURT: Sustained.

5 Q. Did you understand that when you sent your letter off
6 that you did not understand what the letter was to be used for?

7 MS. GOTTLIEB: Objection.

8 THE COURT: I'll allow that question.

9 A. I was asked for a letter about Mr. O'Brien's
10 cooperation and that's what I sent, detailing what the
11 cooperation was.

12 Q. Did you have an obligation to ask what it was to be
13 used for?

14 MS. GOTTLIEB: Objection.

15 THE COURT: Sustained.

16 Q. Mr. O'Brien testified about this letter briefly at
17 trial, correct?

18 THE COURT: Sustained as to the form of the
19 question.

20 MS. HEEGER: Your Honor, I'd like to give the
21 witness the trial transcript excerpts.

22 MS. GOTTLIEB: Judge, I'm going to object to
23 this.

24 THE COURT: Well, I'll see where she's going.

25 Sustained, my own objection to that question the use of the

People-Mattaway-Cross (Heeger)

1 word briefly.

2 Q. Mr. O'Brien testified about this letter at trial,
3 correct?

4 A. No.

5 Q. Can you please turn to 224 in the trial testimony,
6 please? I believe it's under tab A.

7 A. I am looking at 224.

8 MS. GOTTLIEB: Line, please.

9 Q. Correct? Starting at line four. Andrew O'Brien, 224.

10 A. Okay. I don't see anything that says the word letter
11 anywhere.

12 Q. Question, what is your understanding of what if
13 anything I can or will do for you in exchange for you testifying
14 here today for us? Answer, well my understanding is that you'll
15 just tell the federal prosecutors that I cooperated with y'all
16 and that's it. Question, are you a sentenced prisoner? Answer,
17 yes. Question, and you said you have 18 years to go? Answer,
18 yes.

19 A. Okay. There's nothing about a letter in there.
20 Telling is not a letter.

21 Q. Okay, but you writing the letter was telling the
22 federal prosecutors that you cooperated, correct?

23 A. It was memorializing what I told him, him meaning
24 Novak.

25 Q. When Mr. O'Brien then testified that he had 18 years

People-Mattaway-Cross (Heeger)

1 to go and was a sentenced prisoner, didn't that lead the jury to
2 infer that this letter wasn't going to be used for his sentence?

3 MS. GOTTLIEB: Objection.

4 A. There's no letter.

5 THE COURT: Sustained.

6 Q. Well, that your advocacy --

7 MS. GOTTLIEB: Objection.

8 THE COURT: Sustained.

9 Q. Well, did you believe you had any obligation to alert
10 the defense that Mr. O'Brien's testimony had been highly
11 misleading?

12 MS. GOTTLIEB: Objection.

13 THE COURT: Sustained.

14 Q. In Mr. Novak's November 26th email to you, he asked
15 you to check with your homicide detective and determine whether
16 he still intends to write a letter?

17 A. I don't have that in front of me.

18 MS. HEEGER: This is Defendant's F, please. I'd
19 also request that --

20 MS. GOTTLIEB: I think it's already in. Is it?
21 Yes. I think it is.

22 THE COURT: Can I see it? So we have an
23 agreement that it is not in yet?

24 MS. GOTTLIEB: Yes, Judge. I think she only read
25 from it.

People-Mattaway-Cross (Heeger)

1 THE COURT: Defendant's E accepted as evidence.
2 So, set it's accepted as evidence, but I assume you're
3 making an application.

4 MS. HEEGER: Yes. Yes.

5 MS. GOTTLIEB: No objection.

6 THE COURT: Let me see it again. Defendant's E
7 is a two-page document, again, listing a number of emails;
8 first one on page one from Ms. Mattaway to a Chamoy,
9 C-H-A-M-O-Y, dated October 3, 2013. Never mind. That's a
10 mistake. That's the top to you guys, I guess. I
11 apologize. First email is from Mr. Novak to Ms. Mattaway
12 dated November 26, 2007. Sorry about that.

13 (Whereupon, Defendant's Exhibit E is marked into
14 Evidence.)

15 A. What's the question?

16 MS. HEEGER: Could you read the last question
17 back?

18 (Whereupon, the last question was read back.)

19 A. He did. That's what his email to me said.

20 Q. Okay. And did you do as he requested?

21 A. I have no recollection.

22 Q. Ms. Mattaway, can you look at what's marked as
23 People's 2? It's the June 8, 2007 memo to Patrick Bruno.

24 A. Yes.

25 Q. And under the paragraph number one about Andrew

People-Mattaway-Cross (Heeger)

1 O'Brien, it says currently jailed in federal custody for murder
2 unrelated and serving 30 years, has asked for a letter to be
3 prepared by the undersigned that he can have put in his file
4 stating that he testified for the Bronx District Attorney's
5 office. So, Mr. O'Brien did ask you for the letter?

6 A. Again, I don't know that he did. I can't remember if
7 it came from him or someone else. I would think if he did it I
8 would have written he has asked for a letter. I didn't put
9 that.

10 Q. But back in 2007 when you wrote this, your memory
11 would have been better than now?

12 A. I can't say now what my memory would have been.

13 MS. HEEGER: Your Honor, if I may have a moment
14 please. Nothing further, your Honor. Thank you.

15 THE COURT: Anything further?

16 MS. GOTTLIEB: No, Judge.

17 THE COURT: You may step down. Thank you.

18 THE WITNESS: Thank you.

19 THE COURT: Counsel, you want to step up?

20 (Whereupon, there is a discussion held off the
21 record, at the bench, among the Court, the assistant
22 district attorneys, and both defense counsel.)

23 THE COURT: Anything for the record before we
24 adjourn?

25 MS. HERBERT: Your Honor, I believe we had

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1 discussed an adjourn date of June 2nd.

2 THE COURT: Correct.

3 MS. HERBERT: At which time we will hope to have
4 Mr. O'Brien and either some arrangement with respect to
5 Judge Novak or further action will be taken. We would ask
6 the Court to set an interim date, a control date so that
7 Mr. Jimenez might remain at Downstate Correctional Facility
8 in the interim and be returned to Wende Correctional
9 Facility where he came from for today's proceedings or
10 prior to today's proceedings.

11 THE COURT: Do the People wish to be heard?

12 MR. CHAMOY: No, your Honor.

13 THE COURT: Okay. I appreciate the request on
14 behalf of your client. Quite honestly, it's highly
15 unlikely that would work. It may end up being more of an
16 issue for your client the way state corrections operates
17 these days, so I'm going to deny that application. We will
18 have to do another order to produce. And again, my current
19 experience with working with these things, even when you
20 put cases on for two days they won't have him sent back.

21 MS. HERBERT: If the Court could at least mark
22 his card not satisfied.

23 THE COURT: I'll mark the order not satisfied.
24 I'll put it on for a June date. I will request that we do
25 a second or additional order of protection as a safeguard.

Proceedings

1 Obviously, you know, you'll be in touch with my chambers if
2 things change between now and June 2nd. We can work out a
3 change for a date. And it's my understanding that both
4 sides are going to be exchanging information and working on
5 the scheduling potentially with Mr. O'Brien and Judge
6 Novak. Is that a fair and accurate summation of our
7 conversation?

8 MS. HERBERT: That's correct, Your Honor.

9 MS. GOTTLIEB: Yes, Judge. My only concern is
10 with producing the defendant, if the 19th works and he's
11 down here that's one thing, but it seems to me that it's
12 going to be difficult for us to produce him. I assume the
13 People are going to be producing because now he's in
14 transit and we're going to need ten days.

15 THE COURT: We're adjourning to the second, June
16 2nd.

17 MS. GOTTLIEB: Right, but I can't do an order to
18 produce him today from upstate if he's not even there yet
19 is my point. So, if your plan works, then he's going to be
20 at Downstate. If the plan doesn't work, I can't produce
21 him before the 19th. So I'm going to need ten days from
22 the 19th, working days at a minimum, to produce him and I
23 don't know if that's actually ten days. It can't be. Am I
24 correct, Ed?

25 THE CLERK: The order's not going to hold him

Proceedings

1 whether you mark it satisfied or not.

2 MS. GOTTLIEB: I mean, we'll know if he gets sent
3 out. We'll know in a very short period of time whether he
4 gets sent up. But if he gets sent up somewhere between the
5 17th and the 21st is when we run into problems. I
6 shouldn't worry then. Just produce him from upstate.

7 THE CLERK: I know what you're saying, but I
8 don't know where state corrections is going to keep him.
9 It's entirely up to them.

10 MS. GOTTLIEB: I just don't want him in transit
11 in the period that we need to locate him.

12 THE COURT: We'll leave it on for June 2nd.
13 We'll mark it unsatisfied. They'll make a decision whether
14 to hold him or not within the next couple of days. And if
15 that's the case, assuming they send him back upstate
16 sometime next week, we'll have just about ten days between
17 then and June 2nd.

18 MS. GOTTLIEB: Okay.

19 THE COURT: Unless you want to push it out a week
20 and play it safe to June 9th.

21 MS. GOTTLIEB: You know, because then we're going
22 to run into the same problem on the 19th. It will be too
23 many days. Just leave it the way it is and we'll see how
24 it goes.

25 THE COURT: Again, ideally we'll have all this

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1 together for June 2nd. I'll oversee, and if we don't have
2 it together by June 2nd or a very sure day certain for all
3 of this, it is going to get a lot more complicated.

4 MS. HERBERT: Well, we can certainly monitor
5 Mr. Jimenez's location and advise the district attorney's
6 office accordingly.

7 THE COURT: Yes. I think chambers, whoever,
8 contact my chambers and we'll make every effort to make any
9 phone call we can to resolve whatever the situation is.
10 Anything else for the record?

11 MS. GOTTLIEB: No.

12 MS. HERBERT: No.

13 THE COURT: Please mark the order unsatisfied
14 June 2nd.

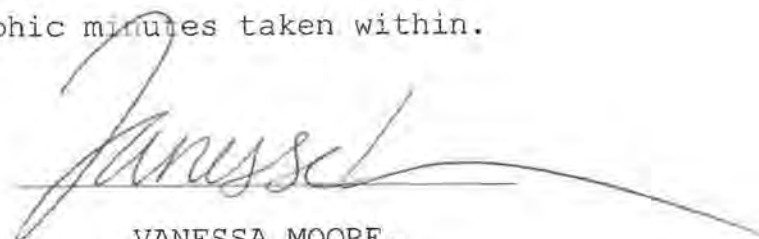
15 A COURT OFFICER: Order not satisfied, June 2nd.

16 THE COURT: Thank you.

17 (Whereupon, the case is adjourned to Friday, June
18 2, 2017.)

19 * * * *

20 Certified to be a true and accurate transcript of
21 the stenographic minutes taken within.

22
23 

24 VANESSA MOORE,
25 Senior Court Reporter

1 SUPREME COURT OF THE STATE OF NEW YORK
2 BRONX COUNTY : CRIMINAL TERM : PART 86

3 -----x
4 PEOPLE OF THE STATE OF NEW YORK

5 -against-

6 RICARDO JIMENEZ

Indictment No.
03825/2006

7 Defendant

8 -----x
9 Bronx Hall of Justice
10 265 East 161st Street
11 Bronx, New York 10451

12 Date: July 21, 2017

13 B E F O R E:

14 HON. ROBERT TORRES,
15 Supreme Court Justice

16 A P P E A R A N C E S:

17 ROBERT T. JOHNSON, ESQ.
18 District Attorney, Bronx County
19 198 East 161st Street
20 Bronx, New York 10451

21 BY: TERRY GOTTLIEB, ESQ.,
22 Assistant District Attorney
23 -and-

24 NOAH J. CHAMOY, ESQ.,
25 Assistant District Attorney

OFFICE OF THE APPELLATE DEFENDER
Attorneys for the Defendant
11 Park Place, Suite 1601
New York, New York 10007

BY: ANASTASIA HEEGER, ESQ.,
Senior Staff Attorney
-and-

ROSEMARY HERBERT, ESQ.,
Supervising Attorney

Peter M. Kent
Senior Court Reporter

Proceedings

1 THE CLERK: On the record.

2 Calling Number 1 on the Part 86 Calendar in the
3 matter of the People of the State of New York against
4 Ricardo Jimenez.

5 Counsels, state your appearances.

6 MS. HEEGER: Anastasia Heeger, H-e-e-g-e-r, from
7 the Office of the Appellate Defender, for the defendant,
8 Ricardo Jimenez.

9 MS. HERBERT: Rosemary Herbert, H-e-r-b-e-r-t,
10 also from the Office of the Appellate Defender.

11 MR. CHAMOY: Assistant District Attorney Noah
12 Chamoy, for the People.

13 MS. GOTTLIEB: Terry Gottlieb, from the Bronx
14 District Attorney's Office.

15 THE COURT: Good morning everyone.

16 MS. HERBERT: Good morning.

17 MS. GOTTLIEB: Hi, Judge.

18 MS. HEEGER: Good morning.

19 THE COURT: I believe there is going to be an
20 application. As for this purpose, you are waiving your
21 client's presence in the courtroom, is that correct?

22 MS. HEEGER: Yes, Your Honor.

23 THE COURT: You may proceed.

24 MR. CHAMOY: Your Honor, the People move to close
25 the courtroom for this proceeding regarding this witness.

Proceedings

1 Mr. O'Brien is in Federal witness security, and for
2 post-conviction proceedings there is no Federal
3 Constitutional right or State right to have open proceedings
4 in a post-conviction hearing. Basically, while he did
5 testify in open court for trial, there was no compelling
6 interest or indeed interest at all in preventing, in
7 preventing, um, an open courtroom from being -- excuse me,
8 from taking place, or as in this case since trial there has
9 since been circumstances that I would consider even
10 compelling under the Federal standard that make it so a
11 closed courtroom is appropriate.

12 Specifically, I will point Your Honor's attention
13 to the affidavit of Wendell Stratford, sworn under oath and
14 provided to this Court previously with the original motion
15 papers that after the trial he was contacted by the
16 Intelligence Division of Rikers Island Jail informing him of
17 credible information from an informant, its own
18 investigation that this defendant had put out a hit on the
19 trial prosecutor and him. That the defendant knew the type
20 of car he drove, his license plate, and where he parked it.
21 And that the Office of the District Attorney and police took
22 measures to ensure the safety of the trial prosecutor.

23 There is -- likewise in paragraph 15 of his
24 affidavit -- there is likewise a similar affidavit from Lisa
25 Mattaway describing the same thing. No -- paragraph 11

Proceedings

1 appears -- excuse me, no, paragraph 12 of her affidavit.
2 This information was not known obviously at the trial. This
3 all came to fruition afterwards. This was a verified threat
4 placed on not just a witness, but in fact the homicide
5 detective and the prosecutor, is more than sufficient reason
6 to close the courtroom to the public in this case.

7 MS. HERBERT: Your Honor, we would oppose that
8 request in that, well, we would ask that Mr. Jimenez' family
9 be allowed to remain in the courtroom.

10 A ruling to close the courtroom and exclude the
11 family would be far broader than is necessary to effectuate
12 any interest the witness may have in protecting his
13 identity. The fact that the witness was or testified in
14 open court and family members were present during the
15 original trial proceedings certainly I think eliminates the
16 notion that revealing or disclosing his physical person in
17 these proceedings would in any way add to his security.

18 He is currently, as we understand it, in prison in
19 an undisclosed location, so nobody quite frankly in the
20 courtroom would have any ability to in any way endanger his
21 safety.

22 And I would also note that the allegations that
23 are referred to by Mr. Chamoy have nothing to do with the
24 witness' appearance and testifying in open court at the
25 trial proceedings.

Proceedings

1 Under those circumstances, I don't think that the
2 heavy burden and these strong preferences for open
3 proceedings can be overcome at least as it relates to the
4 exclusion of Mr. Jimenez' family members.

5 THE COURT: Any response?

6 MR. CHAMOY: The only response I have is that
7 while they cite to the standard for pre-trial and trial
8 proceedings, the fact is that I scoured Federal, State and
9 dually all out of state jurisdictions and could find no
10 constitutional case that stated that an open courtroom was
11 required in a post-conviction hearing. To the contrary, it
12 appears that the Federal Courts are unanimous that many of
13 the rights that the defendant has can be forfeited without
14 constitutional concern, including his own presence, which in
15 New York is solely by Statute.

16 MS. HERBERT: Your Honor, if I might respond?

17 There is also -- I am not aware of any, any
18 decision that holds that proceedings of this sort that a
19 right does not apply. There may not have been specifically
20 extended, but to say the reverse is not necessarily true,
21 and I think particularly given the allegations in the
22 subject of this hearing which deal with the, deal with the,
23 um, withholding of critical information by the prosecutor's
24 office with allegations to that effect, that the fact that
25 this courtroom remain open is of particular importance.

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1 THE COURT: Obviously there are compelling factors
2 to be weighed, and as it is normally the case, I am going to
3 not close the courtroom, per se. However, I am going to
4 restrict any movement in and out of the courtroom. So you
5 are in the courtroom now, you will not be allowed in and out
6 of the courtroom. Be it someone's in the courtroom now,
7 they leave, they will not be allowed back in, and from this
8 moment on nobody else will be allowed into the courtroom.

9 The record should reflect at this point in time,
10 besides the attorneys for both sides, a paralegal we already
11 mentioned on the record is here for the hearing, and an
12 intern from the defense side, I believe it's two family
13 members, everyone else in the courtroom are court personnel
14 or my own -- one of my staff. So we will post an officer at
15 the door. Nobody comes in and nobody goes out. If they do,
16 they cannot come back in.

17 Anything else for me to address?

18 The People's exception to that ruling will be
19 noted for the record.

20 MR. CHAMOY: Thank you, Your Honor.

21 THE COURT: Anything else we need to address
22 before we proceed?

23 MS. HEEGER: Your Honor, I mentioned earlier today
24 the June 6th letter that I had sent to the Court and sent to
25 the People. I don't know if you want to discuss that now.

1 We can certainly do it later.

2 MR. CHAMOY: Your Honor, it is unrelated to this
3 witness' testimony.

4 THE COURT: Let's get the witness on the stand,
5 take care of that. We can address all other matters at a
6 later time.

7 MS. HEEGER: Thank you, Your Honor.

8 THE COURT: Anything beyond that?

9 MR. CHAMOY: No, Your Honor.

10 MS. HEEGER: No, Your Honor.

11 THE COURT: I should note that my ruling of the
12 closing of the courtroom takes into account that the
13 testimony at the trial the courtroom was not closed.

14 (Brief pause.)

15 THE CLERK: Recalling in the matter of the People
16 of the State of New York against Ricardo Jimenez.

17 Let the record reflect that the defendant is now
18 in the courtroom.

19 THE COURT: Ready to proceed?

20 MS. GOTTLIEB: Yes, Your Honor. The People are
21 ready to proceed.

22 We call our first witness, Andrew O'Brien to the
23 stand.

24 COURT OFFICER: Witness entering.

25 (Whereupon, the witness, Andrew O'Brien, entered

1 the courtroom and took the stand.)

2 COURT OFFICER: Remain standing. Please raise
3 your right hand.

4 THE CLERK: Do you swear or affirm that the
5 testimony you will give will be the truth, the whole truth,
6 and nothing but the truth so help you God?

7 THE WITNESS: I do.

8 COURT OFFICER: State your full name for the
9 record, spelling your last name.

10 THE WITNESS: Andrew O'Brien. O-'-B-r-i-e-n.

11 THE COURT: Good morning.

12 THE WITNESS: Good morning.

13 THE COURT: You want to proceed?

14 MS. GOTTLIEB: Thank you.

15 DIRECT EXAMINATION

16 BY GOTTLIEB:

17 Q. Mr. O'Brien, I am going to ask you to speak up nice and
18 loud.

19 Do you remember a -- I am going to take you back to
20 around June 2007 -- did you testify in a case entitled the People
21 State of New York versus Ricardo Jimenez?

22 A. Yes.

23 Q. And when you testified in that case, did you testify
24 truthfully?

25 A. Yes.

1 Q. And prior to testifying in that case, did you meet with
2 an ADA by the name of Lisa Mattaway?

3 A. Yes.

4 Q. And prior to testifying for ADA Mattaway, did you
5 discuss what, if anything, she would do for you if you testified?

6 A. Yes.

7 Q. Did you testify at trial about what Lisa Mattaway said
8 she would do for you?

9 A. Yes.

10 Q. And when you testified at trial, did you testify
11 truthfully about that issue?

12 A. Yes.

13 Q. And when you testified at trial, was it your
14 understanding -- and I will quote from the transcript -- Page 24
15 to 25 -- it was your understanding that -- you're speaking to
16 Ms. Mattaway -- just tell the Federal prosecutor that I
17 cooperated with you and that's it?

18 A. Yes.

19 Q. Is that what you testified to?

20 A. Yes.

21 Q. Was that the full extent of what Lisa Mattaway told you
22 she would do for you?

23 A. Yes.

24 Q. And did she make any other promises to you?

25 A. No.

1 Q. Did AUSA David Novak make any promises to you if you
2 testified for ADA Mattaway?

3 A. No.

4 Q. Did Detective Wendell Stratford make any promises to
5 you if you testified for ADA Mattaway in the case of the People
6 versus Ricardo Jimenez?

7 A. No.

8 Q. So the full extent of your promise from Lisa Mattaway
9 was for your -- that you testified at trial in June 2007?

10 A. Yes.

11 MS. GOTTLIEB: No further questions.

12 THE COURT: You may inquire.

13 CROSS EXAMINATION

14 BY MS. HEEGER:

15 Q. Mr. O'Brien, you had occasion to speak with the
16 prosecutor this morning?

17 A. Yes.

18 Q. And what was the subject of your conversation?

19 A. She asked me about the past situation with the ADA.
20 She asked me if she promised me anything and I told her no.

21 Q. What were you told about the purpose of today's
22 proceedings?

23 MS. GOTTLIEB: Objection.

24 Q. What is your understanding of the purpose of today's
25 proceeding?

1 A. Well, my understanding was that, um, I guess he got an
2 appeal, and that's what the issue was.

3 Q. And prior to today, has anyone from the DA's Office
4 spoken to you about today's proceeding?

5 A. No.

6 Q. Now, in 1997 you signed a plea agreement with the Feds,
7 correct?

8 A. Yes.

9 Q. Under this agreement you pled to a single RICO charge?

10 A. Yes.

11 Q. You were sentenced to life in prison?

12 A. Yes.

13 Q. And you agreed to cooperate with FBI investigators?

14 A. Yes.

15 Q. And to testify against fellow members of the Poison
16 Clan?

17 A. Yes.

18 Q. And when you testified, you testified with the hope
19 that your sentence would be cut?

20 MS. GOTTLIEB: I am going to object to the form of
21 the question.

22 THE COURT: As to the form of the question, I
23 sustain the objection.

24 Q. You testified about this plea agreement at
25 Mr. Beckford's trial, correct?

1 A. Yes.

2 MS. GOTTLIEB: Objection.

3 To which trial?

4 Q. The Poison Clan trial?

5 A. Yes.

6 Q. Yes. And at that trial did you testify that you hoped
7 that the Federal prosecutor would make a motion to reduce your
8 sentence?

9 A. Yes, I think so. I don't know, it's been a long time.

10 Q. Would looking at the transcript of that proceeding
11 refresh your recollection?

12 A. I guess, yeah.

13 MS. GOTTLIEB: Judge, I am going to object to this
14 line of questioning. I am not sure what that trial has to
15 do with this trial.

16 THE COURT: Yes. I am not sure where you are
17 going with this line of questioning.

18 MS. HEEGER: Your Honor, if we can approach, I
19 would be happy to explain it.

20 THE COURT: Approach. On the record.

21 (Whereupon, a side-bar conference was held by the
22 Court and counsels, on the record as follows:)

23 MS. HEEGER: Your Honor, Mr. O'Brien's 1997 plea
24 agreement and his understanding of how the agreement took to
25 cooperate and what that results in is directly relevant to

1 his understanding of the agreement of -- we are trying to
2 connect the understanding of what happened at Mr. Jimenez'
3 trial.

4 THE COURT: How are you trying to connect them?

5 MS. HEEGER: Well, I'd like the opportunity to
6 explore this, what was, what was said in the agreement and
7 what he, what his understanding of what cooperation means
8 and how this all works.

9 And the People said this business about a promise.
10 I am trying to elicit his understanding of how these
11 promises worked the first time around, which I think is
12 directly relevant to how they understood the promises to
13 work in this proceeding. I don't have a lot of questions on
14 it, but I'd like to explore this.

15 MS. GOTTLIEB: Judge, if she wants to find out
16 what his cooperation agreement was, just ask what the
17 cooperation agreement was. I am not sure if we need to go
18 into are you trying to impeach him with prior testimony.
19 I'm not sure where you are going with the prior trial
20 testimony.

21 I think that the problem --

22 MS. HEEGER: I am trying to elicit the exact
23 nature of what the promise was the first time around.

24 MS. GOTTLIEB: Is there an agreement? Do we have
25 a copy of the agreement?

Andrew O'Brien-People-Cross (Heeger)

1 MS. HEEGER: Well, there is that, but then he was
2 specifically asked at Mr. Beckford's trial, which is the
3 Poison Clan trial, of how -- what he understood that
4 agreement to mean, which is not in the agreement.

5 MS. GOTTLIEB: Well, his testimony would not be in
6 there. I am not sure how that's relevant to how, you
7 know --

8 MS. HEEGER: The agreement, the agreement says we
9 can do it through the agreement. That's fine. I mean we
10 can do it through the agreement.

11 THE COURT: Well, you can try to elicit what his
12 understanding of the agreement was.

13 Why don't you just ask him that? Why are we going
14 over testimony?

15 MS. HEEGER: Well, he said he didn't obviously
16 know, that's why I was trying to go from that approach.

17 THE COURT: Well, maybe you should rephrase the
18 question and ask him what was his understanding. Ask him
19 directly.

20 MS. HEEGER: That's fine.

21 We'll proceed that way.

22 THE COURT: I don't -- are you trying to get to
23 his understanding? Um -- just get there.

24 MS. HEEGER: Okay, fair enough.

25 (Whereupon, the parties returned to their

1 respective places in the courtroom.)

2 THE COURT: The objection is being sustained.

3 Rephrase your question.

4 Q. Mr. O'Brien, in your plea agreement the Government did
5 not promise that they would file a Rule 35 motion, did they?

6 A. No.

7 Q. No.

8 They said that it was up to their discretion, correct?

9 A. Yes.

10 Q. And they could not guarantee that Judge Payne would
11 grant it, correct?

12 A. Yes.

13 Q. But when you testified in the Poison Clan trial, you
14 hoped that they would?

15 A. Yes.

16 Q. Now, also as a result of your cooperation, you were put
17 in the WITSEC Program?

18 A. Yes.

19 Q. And under this program are your communications heavily
20 monitored?

21 MS. GOTTLIEB: Objection.

22 THE COURT: Sustained.

23 Q. Are your calls recorded?

24 MS. GOTTLIEB: Objection.

25 THE COURT: Sustained.

1 Q. Are your letters logged?

2 MS. GOTTLIEB: I am not sure what this has to do
3 with this.

4 THE COURT: Sustained.

5 The parameters of the program even now is not an
6 issue to this court.

7 Move on.

8 Q. What year was your sentence?

9 A. What year? Um, I think it is 199 --

10 MS. GOTTLIEB: Objection to the form of the
11 question. I'm not sure what she's talking about, the
12 original agreement?

13 THE COURT: No -- yes, for clarity of the record.

14 MS. HEEGER: Correct.

15 THE COURT: I may be wrong, there is more than one
16 circumstance you're addressing?

17 MS. HEEGER: That is correct, Your Honor.

18 Q. What year was your life sentence reduced to 30 years?

19 A. I think it was 1998.

20 Q. And that year you started talking to an NYPD detective
21 about this case?

22 A. Yes, I think it was a year after.

23 Q. And you reached out to offer assistance, is that
24 correct?

25 A. Yes.

1 Q. And you first spoke to a Detective Pfeiffer?

2 A. Yes.

3 Q. Then a Detective Stratford followed up?

4 A. Yes.

5 Q. How did you first come into contact with Mr. Stratford?

6 A. Um, I think Ms. Pfeiffer relayed him -- me to him or
7 whatever.

8 Q. Did he call you?

9 A. Um, I think I called him.

10 Q. And you eventually met Mr. Stratford in 2001?

11 A. Yes.

12 Q. About how many times had you spoken on the phone prior
13 to that?

14 A. Um, good amount of times.

15 Q. Could you give us an estimate?

16 A. Ten, fifteen.

17 Q. And that's before you met him the first time?

18 A. Um, yes, I would say so.

19 Q. And what were the subject of your conversations?

20 MS. GOTTLIEB: Objection.

21 THE COURT: As to the following question,
22 sustained.

23 Q. Were you talking about this case -- Mr. Jimenez' case?

24 A. Eventually, yes.

25 Q. What else were you talking about?

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1 MS. GOTTLIEB: Objection.

2 THE COURT: Sustained as to the form of the
3 question.

4 Q. You met with Detective Stratford and an FBI agent in
5 2001?

6 A. Yes.

7 Q. And was this the only time you met with Detective
8 Stratford?

9 A. No, I think, I, I think I seen him two times after
10 that.

11 THE COURT: You said after that?

12 THE WITNESS: After, after the, um, um, after I
13 seen him then I think I seen him a total three times.

14 THE COURT: Thank you.

15 Q. And during these meetings, did you discuss the length
16 of your sentence?

17 A. Yes.

18 Q. And did you discuss your hopes of getting a time cut?

19 A. Yes.

20 Q. And did you discuss what it is you would be looking for
21 if you wanted to cooperate?

22 A. Say -- what do you mean by that, as far as what?

23 Q. Well, what you would want if you cooperated?

24 MS. GOTTLIEB: Objection.

25 THE COURT: I will allow that question.

1 A. What I would want?

2 Q. Yes?

3 A. I would want -- only things I could hope for is a
4 reduction in my sentence.

5 Q. And you discussed this with Detective Stratford?

6 A. To a certain extent.

7 Q. Could you explain?

8 A. Well, I probably, um, I probably, um, complained to him
9 about my sentence, you know, you know, my situation. He's not in
10 a position to help me -- do anything for me -- so he really could
11 not tell me that he could do anything for me.

12 Q. Did he say he would relay that information to the
13 prosecutor?

14 A. Um, I don't remember him saying that, you know.

15 Q. And did Detective Stratford or -- did he ever relay
16 information to the prosecutor from you?

17 MS. GOTTLIEB: Objection to the form of the
18 question.

19 THE COURT: Sustained.

20 MS. GOTTLIEB: I am not sure what she is talking
21 about, "the prosecutor."

22 THE COURT: Sustained. Sustained.

23 MS. GOTTLIEB: Thank you.

24 Q. During the time period that you were speaking to
25 Detective Stratford about their case, did you ever give him

1 information or messages to relay to the prosecutor on your
2 behalf?

3 MS. GOTTLIEB: Judge, again, I am going to object
4 to the form of the question. We have two prosecutors, the
5 Federal prosecutor and the State prosecutor, I'm not sure
6 who we are talking about.

7 MS. HEEGER: We are talking about the State
8 prosecutor, ADA Mattaway.

9 A. Did he relay? Um, he could have. I don't know what he
10 did -- if he did that or not.

11 Q. Did you ask him to?

12 A. Um, I could have.

13 Q. And could you have asked him to ever relay information
14 to Mr. Novak?

15 A. Him personally? Um, I don't think so.

16 Q. But you kept in touch with Mr. Novak over the years?

17 A. Yes.

18 Q. You would negotiate your plea with him?

19 A. Yes. In the past, yes.

20 Q. Yes.

21 He signed your plea agreement?

22 A. Yes.

23 Q. And he was your, he was your sponsor for the Witness
24 Protection Program?

25 A. Yes.

1 Q. He was your sponsor?

2 A. (No response.)

3 Q. It's fair to say over the years you had asked Mr. Novak
4 if there was anything you could do to reduce your sentence?

5 MS. GOTTLIEB: Objection to the form of the
6 question.

7 THE COURT: I will allow it.

8 Move on.

9 A. Yes.

10 Q. You were hopeful that something could be done?

11 A. Yes.

12 Q. And if something was done, you knew that it would have
13 to be through a Rule 35 motion?

14 A. Yes.

15 Q. And Mr. Novak left the door open for that?

16 MS. GOTTLIEB: Objection.

17 THE COURT: Sustained.

18 Q. Mr. Novak said he would consider that?

19 MS. GOTTLIEB: Objection.

20 THE COURT: I will allow that question --

21 MR. CHAMOY: Your Honor, if we could get a time
22 frame we are discussing.

23 THE COURT: -- on the grounds.

24 Q. Well, let's start with, since your sentencing, since
25 you were in -- in your discussions with Mr. Novak, did he tell

1 you that he would consider a Rule 35?

2 MS. GOTTLIEB: Objection, Judge.

3 THE COURT: Again, this is the problem, we already
4 know that there was some consideration and some involvement,
5 that's not the issue before this court. So I am allowing
6 you some leeway just for the purposes of having some
7 foundation on the record, but we already know some of this
8 stuff. It's not the issue before this court.

9 MS. HEEGER: Your Honor, respectfully, I am not
10 sure I understand.

11 THE COURT: That's my ruling day one of this
12 hearing, again, as the Court of Appeals specified what the
13 issue is. So we are going far-afield. Again, I am giving
14 you some leeway, but let's get to the point.

15 MS. HEEGER: Okay, Your Honor, respectfully -- I
16 respectfully disagree, this is exactly the point.

17 THE COURT: Okay, you have your record that you
18 disagree, you also have my ruling. And again, for the third
19 time, I am giving you some leeway, but that's just some
20 leeway. Get to the heart of the issue before this court.
21 Move on.

22 MS. HERBERT: Your Honor, if we could just have
23 one moment?

24 (Brief pause.)

25 MS. HEEGER: Okay.

1 Q. After you had already received an initial Rule 35
2 sentence reduction, did Mr. Novak say that he would consider a
3 second one?

4 A. At some point, yes.

5 Q. Now, after you met with Detective Stratford, you wrote
6 a letter?

7 A. I wrote a few letters. So --

8 Q. And if I showed you a copy of the letter, would that
9 refresh your recollection?

10 A. Yeah.

11 (Brief pause.)

12 MS. HEEGER: Your Honor, I'd like this marked as
13 Defendant's Exhibit F as in "Frank," please, for
14 identification.

15 THE COURT: Defendant's F for identification.

16 MS. GOTTLIEB: I have no objection to it being
17 moved into evidence.

18 THE COURT: As evidence.

19 (Whereupon, Defendant's Exhibit F was marked in
20 evidence.)

21 COURT OFFICER: Defendant's F so marked in
22 evidence.

23 MS. HEEGER: For the record, this is a five page
24 handwritten letter addressed to whom it may concern.

25 THE WITNESS: Yeah. Yes.

1 Q. And is this your letter?

2 A. Yes. This is my handwriting, yep.

3 Q. And what is the subject of that letter?

4 A. The subject is me explaining everything that took
5 place.

6 Q. And when did you write that letter?

7 A. Um, on the date it says 1/16/01.

8 Q. And who is that letter meant to be sent to?

9 A. Um, I can't remember exactly who it was suppose to be
10 meant for, but I think at one time Detective Stratford wanted me
11 to document, write down anything that I was, that I remember from
12 the case. I don't remember who I sent this to though.

13 Q. So was there a purpose beyond memorializing the
14 conversation?

15 A. Not that I can recall.

16 Q. Did you ever send it to anyone?

17 A. I believe this letter was written when he told me he
18 wanted me to write down everything that I remember. I don't
19 think this letter was specifically to go to anybody as far as my,
20 um, I think it was just -- I don't know if he gave it to the DA
21 or whoever, but that's what I remember writing.

22 Q. Is that letter complete?

23 MS. GOTTLIEB: Objection --

24 A. Is it complete?

25 MS. GOTTLIEB: -- to the form of the question.

1 Complete as to the letter or as to the facts?

2 Q. Is there more to the letter?

3 A. I don't know.

4 Q. It's not signed.

5 Did you sign the letter?

6 A. I don't remember.

7 Q. Okay. Now, Ms. Mattaway came to see you in 2006?

8 A. I believe so.

9 Q. And she came with Detective Stratford?

10 A. Yes.

11 Q. And did you tell her about your very long sentence?

12 A. Could have, yes.

13 Q. And did you tell her that you had cooperated before and
14 got a sentence reduction?

15 A. I don't remember if I told her that or not.

16 Q. And -- but you told her you wanted to cooperate on her
17 case?

18 A. I said I was willing, yes.

19 Q. And you told her that you wanted her to tell the
20 Federal prosecutors that you had cooperated?

21 A. Yes.

22 Q. And you told her that you were hoping this, this
23 cooperation -- ADA Mattaway -- that you hoped this cooperation
24 would lead to a time out?

25 A. I don't recall saying that to her in particular. I

1 can't say that I did, I can't say that I didn't.

2 Q. And specifically you wanted her to write a letter about
3 your cooperation?

4 A. Yes.

5 Q. And you wanted her to write this letter for Mr. Novak?

6 A. Yes.

7 Q. And Mr. Novak is the, is the person, is the person who
8 was going to keep an open mind about --

9 MS. GOTTLIEB: Objection.

10 THE COURT: Sustained as to the phraseology in
11 that question.

12 Q. Mr. Novak is the person who would have to file the
13 Rule 35?

14 A. Yes.

15 Q. And you were hoping that Mr. Novak would consider your
16 assistance in this case as being the basis for a Rule 35?

17 A. Yes.

18 Q. Now, in March 2006 you wrote a couple of letters to
19 Judge Payne, correct?

20 A. Yes.

21 MS. HEEGER: I'd ask to have this marked as
22 Defendant's G.

23 Is there any objection to putting this into
24 evidence?

25 MS. GOTTLIEB: No objection to it going into

1 evidence.

2 THE COURT: In evidence as Defendant's G.

3 (Whereupon, Defendant's Exhibit G was marked in
4 evidence.)

5 COURT OFFICER: Defendant's Exhibit G so marked in
6 evidence.

7 Q. Now, Mr. O'Brien, are these the materials that you
8 mailed to Judge Payne?

9 A. Yes.

10 Q. And this package of materials, it includes one letter
11 dated March 21, 2007?

12 A. Yes.

13 Q. And then there are two letters dated March 20, 2006?

14 A. Yes.

15 Q. And then you have some letters of support and
16 certificates attached to that, is that correct?

17 A. Yes.

18 Q. I want to talk about the March 2006 letters first. The
19 first letter that -- the one page letter.

20 A. Which one?

21 Q. The one, the one page letter from March 20, 2006.

22 A. All right.

23 Q. Now, in this letter you are asking the judge to do
24 something or to consider doing something?

25 A. Are you saying the first letter or --

1 Q. Correct. First. March 20, 2006.

2 A. This is not from me. This is a letter from somebody
3 else. This is a letter of support. Are you talking about the
4 other one?

5 Q. Just to be clear, the letter addressed to Judge Payne
6 signed by you.

7 A. Okay.

8 Q. That's dated March 20, 2006 and it starts --

9 A. 2006? This is 2007.

10 Q. It's the second page.

11 A. Okay.

12 Q. Correct?

13 A. I got it.

14 Q. Okay. And you were asking the judge to consider doing
15 something?

16 A. Yes.

17 Q. And what were you asking him to do?

18 A. Um, I was asking him to run my New York State sentence
19 concurrent.

20 Q. And that was the New York State sentence you had gotten
21 for the weapons conviction in the Rudy McKay incident?

22 A. Yes.

23 Q. And the violation of probation?

24 A. Yep.

25 Q. And you wanted him to do a new judgment and commitment?

1 A. Yes.

2 Q. And to mention that sentence so it would run concurrent
3 with everything else?

4 A. Yes.

5 Q. Now, you knew that the judge just could not do that out
6 of thin air, correct?

7 A. Well, under the law, sometimes if they -- if it's --
8 sometimes if it's done out of -- they didn't know if the judge
9 wanted to run it concurrent or consecutive because he never, he
10 never said anything about it. So you could have the sentence,
11 the order of judgment corrected under the clerical error if it
12 was done by omission.

13 Q. But it was not a clerical error?

14 A. We don't know.

15 THE COURT: He answered.

16 Next question.

17 Q. But there needs to be a motion, correct?

18 A. Yeah.

19 MS. GOTTLIEB: Objection.

20 THE COURT: I am a little confused. Where are we
21 going with all of this?

22 MS. HEEGER: I promise to have a destination.

23 THE COURT: Well, I will give you a little bit
24 more leeway, but very little.

25 MS. HEEGER: Okay.

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1 THE COURT: Let's move on.

2 Q. You noted that in your letter you wrote that the
3 prosecutor, Mr. Novak, would have to agree?

4 A. If it says in the letter I guess I said it.

5 THE COURT: Well, the letter is now in evidence,
6 it speaks for itself.

7 MS. HEEGER: Right.

8 THE COURT: Move on.

9 Q. Because a motion would have to be before the Court --
10 you knew that a motion would have to be before the Court to
11 change your sentence?

12 MS. GOTTLIEB: Objection, Judge.

13 It says -- it's the fourth line down -- says I
14 would need to get Prosecutor Novak to agree. It doesn't say
15 anything about him needing to know there was a motion or
16 anything of that -- I think the letter speaks for itself.

17 THE COURT: Sustained.

18 Move on.

19 Q. How did you believe that the Court would change your
20 sentence?

21 A. Well, this letter could be taken as a motion if you are
22 a Pro Se litigant and you don't know the law. You could write a
23 letter, the judge -- the court recognizes it as a Pro Se motion,
24 and if it could be done he will do it. That's why I mentioned
25 the 5g1 because it's a statute that they use to give people

1 credit for time they did on their State sentence in the Federal
2 Court.

3 Q. But Rule 35 is the mechanism to change a sentence?

4 MS. GOTTLIEB: Objection.

5 THE COURT: Don't answer.

6 Move on.

7 Q. Let's talk about the second letter.

8 A. The second letter?

9 Q. The next letter that you wrote that's also dated March
10 20, 2006. And in this letter, at the third paragraph on the page
11 you wrote, when I came before you there were a number of
12 mitigating circumstances which no one took into consideration.

13 A. Yes.

14 Q. And when you talked about going, you were talking about
15 the first Rule 35 motion?

16 A. Yes.

17 Q. And in this letter is it fair to say you were
18 contending that you had too much time?

19 A. Yes.

20 Q. And that it was unfair?

21 A. Yes.

22 Q. And that you had had the harshest sentence of anybody
23 you had ever met?

24 A. Yes.

25 Q. On the, on the third page, the second paragraph from

1 the bottom, you wrote that you had been writing letters for
2 inmates going before judges for resentencings.

3 A. Yes.

4 Q. So you have assisted other people with Rule 35's?

5 A. No, it wasn't Rule 35, these were letters when people
6 are going to get sentenced they would write a letter to the judge
7 asking them to, even though you committed bad crimes, but you
8 asking him for leniency.

9 Q. So sentencing is not recent --

10 MS. GOTTLIEB: Objection.

11 THE COURT: I don't know where all this is going
12 with regards to the issue before this court.

13 MS. HEEGER: Your Honor, if could finish my line
14 of questioning, I will get there.

15 THE COURT: You said that a few minutes ago.
16 Seems like we are going farther astray.

17 This individual, this witness has knowledge of how
18 the sentencing structure during or resentencing in the
19 Federal statute works. It's not relevant to the issue
20 before this court.

21 MS. HEEGER: Your Honor, I --

22 THE COURT: So move on.

23 Q. You sent these --

24 MS. HEEGER: Strike that.

25 Q. You wrote those letters in 2006 but you did not send

1 them, correct?

2 A. Which ones? This letter here?

3 Q. Yes.

4 A. Um, yeah.

5 Q. You held onto them for a year?

6 A. Yes.

7 Q. Why?

8 MS. GOTTLIEB: Objection.

9 THE COURT: Sustained.

10 Q. When did you mail the letters?

11 A. Um, I believe it is 2007.

12 Q. Why did you wait a year to mail the letters?

13 MS. GOTTLIEB: Objection.

14 THE COURT: Sustained.

15 MS. HEEGER: Your Honor, may I ask the basis of
16 the objection?

17 MS. GOTTLIEB: Irrelevant to the hearing.

18 THE COURT: Move on.

19 MS. HEEGER: Your Honor, I believe that these are
20 relevant to the hearing given the date that they were
21 mailed.

22 THE COURT: Side-bar. On the record.

23 (Whereupon, a conference was held at side-bar by
24 the Court and counsels, on the record as follows:)

25 THE COURT: You wish to respond?

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1 MS. GOTTLIEB: Your Honor, when the defendant
2 writes letters to the judge and -- I mean he could write
3 them every week, every day. I went to law school doing
4 Pro Se prisoner complaints for a Federal magistrate, that
5 doesn't mean the prosecution on the Federal level or the
6 State level made promises to this defendant, which is the
7 issue Detective Stratford made. He knows how the system
8 works. He knows how to file a Pro Se prisoner complaint,
9 and Federal prisoners do it on a daily basis. I don't think
10 it is relevant to the hearing and he waited a week or a day
11 or a year or that he filed these letters, it's really what
12 the promises were.

13 MS. HEEGER: Your Honor, this hearing is not
14 restrained about promises. The decision from the Appellate
15 Division is about whether or not there were quid pro quos,
16 whether or not there were understandings here. What I am
17 getting at is the understanding in my previous line of
18 questioning was what was Mr. O'Brien's understanding with
19 Mr. Novak, which is why I was asking those questions. And
20 the understanding of Mr. Novak is that Mr. Novak would
21 consider a Rule 35 motion, that's part of it. The other
22 part of it is why I am asking this now is that he wrote
23 these letters, and I wanted to explore why he did not send
24 them in 2006, but instead waited until after he had spoken
25 to the ADA, after he had an understanding from her that he

1 would write a letter, a letter that in his mind is now
2 connecting with his, with Mr. Novak's willingness to
3 consider this. And he, he sent these at a time -- I'd like
4 to demonstrate or have the opportunity to when he believed
5 that Judge Payne would have an opportunity to consider his
6 sentences again, and that is what is to be considered on the
7 Rule 35 motion.

8 THE COURT: Well, his belief is not core to this
9 issue. Whether he believes something or not it is not core
10 to this issue. When they were mailed. You have that on the
11 record also and in evidence and part of the record, okay?
12 His belief is not the core issue that's before this court.
13 I have given you a lot of leeway to go in big circles and
14 you are going in circles.

15 So, to the extent that his beliefs or his
16 reasoning for that not sending the letter until later on, I
17 am stopping you here with that question. I am not
18 necessarily closing the door to the whole -- to your
19 hearing, but you are going in circles and you are trying to
20 create something here because of this that means this
21 happened, and that's not what the law requires.

22 So we'll go back and continue.

23 MS. HEEGER: Your Honor, may I? I'm sorry. I do
24 want to make an objection here clear.

25 THE COURT: You already made your objection and it

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1 is already clear. You have your record. I made my ruling.
2 Go back and ask your questions.

3 (Whereupon, the parties returned to their
4 respective places in the courtroom.)

5 MS. HEEGER: And if I may just have a moment?

6 (Brief pause.)

7 Q. When you sent those letters to Judge Payne, you
8 expected the Rule 35 motion might be filed?

9 A. No.

10 MS. GOTTLIEB: Objection.

11 THE COURT: No.

12 Q. But --

13 THE COURT: He's answered. He's answered.

14 Q. But by March 2007 you had a discussion with ADA
15 Mattaway?

16 MS. GOTTLIEB: Objection.

17 A. I don't remember the date.

18 THE COURT: Overruled.

19 Q. You met with ADA Mattaway in December 2006, correct?

20 A. '06, right.

21 Q. You had made an agreement with her to testify in
22 exchange for a letter to Mr. Novak?

23 A. Yes.

24 Q. And you sent your materials to Judge Payne after you
25 had made that agreement?

1 A. Well, I know I sent the letter, I don't know about --
2 are you talking about the rest of this stuff?

3 Q. Correct.

4 A. I don't think --

5 Q. Correct.

6 A. -- I don't think I sent -- I think I sent this stuff
7 before Rule 35. This stuff here.

8 Q. Well, yes, but --

9 A. I'm talking about when I was going for a Rule 35
10 Hearing, this is when I sent the packet, this is not when I sent
11 the letter by itself.

12 Q. Well, the first letter on the first page there, that's
13 dated March 21, 2007?

14 A. Yes.

15 Q. You wrote to Judge Payne -- I wrote the preceding two
16 letters --

17 MS. HEEGER: Strike that.

18 Q. -- I wrote the preceding two letters a year ago. You
19 wrote that, correct?

20 A. Yes.

21 Q. So you sent all of those materials, all the letters and
22 materials up there you sent to Judge Payne?

23 A. Yeah, but I don't think I sent this letter here the
24 same time I sent the other stuff the way I remember it because
25 when I -- if you look at the paragraph of this, of this letter,

1 says I -- you know -- you can't, can't help me. So I was not
2 going up to him for a Rule 35, I was just writing how I felt to
3 the judge.

4 Q. Okay, but you were, you were expecting one would be
5 filed in the future?

6 MS. GOTTLIEB: Objection.

7 A. I don't know if I was expecting. I might have hoped
8 for one.

9 THE COURT: Overruled.

10 MS. HEEGER: One moment, Your Honor.

11 (Brief pause.)

12 MS. HEEGER: Your Honor, nothing further.

13 THE COURT: Okay. Ms. Gottlieb?

14 RE-DIRECT EXAMINATION

15 BY MS. GOTTLIEB:

16 Q. You spoke to ADA Mattaway in 2006, correct?

17 A. Yes, I believe so.

18 Q. But you actually entered into an agreement with her and
19 testified where she would give you a letter in June 2007, isn't
20 that correct, right before trial?

21 A. I believe so. You know, I am fuzzy on the dates,
22 but --

23 Q. When you went, you met with Ms. Mattaway right before
24 trial, correct?

25 A. Yes.

1 MS. HERBERT: Objection.

2 Leading.

3 THE COURT: Sustained.

4 Q. You met with Ms. Mattaway for the first time -- when
5 did you first meet with Ms. Mattaway?

6 A. I think when the first time I met her is when she came
7 up to see me with Detective Stratford.

8 Q. You testified on cross examination that was 2006,
9 correct?

10 A. I believe so, yes.

11 Q. And you didn't meet with her again until the trial in
12 June 2007?

13 A. Only that -- I think I seen her that morning.

14 Q. The morning before the trial in 2007?

15 A. Yes.

16 Q. And so did you have any conversation with her between
17 2006 when you met her with Detective Stratford until you met her
18 again right before the trial in 2007?

19 A. I don't believe so.

20 Q. So -- but you mailed these letters in March 2007,
21 correct?

22 A. Yes. Yes.

23 Q. Other than writing a letter, did Ms. Mattaway promise
24 you anything, anything besides writing a letter?

25 A. No, that's it.

1 Q. Any change in sentences, any letters to the judge,
2 anything besides that one letter that she wrote to the --

3 A. No.

4 Q. You had hopes that your testimony would help you in
5 some way, correct?

6 A. Yes.

7 Q. But there were actually no promises from Novak,
8 Stratford or Mattaway other than the letter?

9 A. Yes.

10 Q. I mean other than for the letter from Lisa Mattaway,
11 that was the only promise made?

12 A. Yes.

13 Q. You said you had conversations with AUSA Novak?

14 A. Yes.

15 Q. Okay. Did you also in any of those conversations
16 indicate that second reductions are greatly disfavored and
17 unlikely?

18 A. We had, we had disagreements about -- I don't know if
19 he said it in those terms, but --

20 Q. Did he make it clear that Rule 35 second reductions are
21 really hard to come by?

22 A. I don't remember him saying that exact thing.

23 MS. GOTTLIEB: No further questions.

24

25

1 RE-CROSS EXAMINATION

2 BY MS. HEEGER:

3 Q. When you were brought down for Mr. Jimenez' trial, was
4 it the morning of your testimony or the morning before then?

5 A. The morning of the testimony.

6 Q. And, just to be clear, you had a letter of agreement
7 with ADA Mattaway prior to that day, didn't you?

8 A. A letter of agreement --

9 THE COURT: Rephrase the question.

10 MS. HEEGER: Yes.

11 Q. The agreement with Ms. Mattaway was that she would
12 write you a letter --

13 A. Yes.

14 Q. -- was prior to you being brought down for trial?

15 A. Um, I'm not sure if it was before or after or on that
16 day.

17 Q. Was that negotiated in your in person meeting with her
18 in the summer of 2006?

19 A. I don't know. Like I said, it is when I, either when I
20 seen her when she came to see me or the day of the trial, I don't
21 remember which day it was.

22 Q. But it was done in person?

23 A. Yes.

24 Q. And you just testified that about your discussions with
25 Mr. Novak about second Rule 35 --

1 A. Yes.

2 Q. -- and he told you that they were not common?

3 A. Excuse me? Oh, yes. I don't recall that, him saying
4 it's not common.

5 Q. He didn't tell you that he would not do one?

6 A. He didn't say he would not, and didn't say he would.

7 Q. He said never say never?

8 A. I guess.

9 Q. So that was open to you?

10 MS. GOTTLIEB: Objection.

11 THE COURT: Overruled.

12 You may answer that.

13 A. I mean it was better than no.

14 Q. And you testified that ADA Mattaway did not promise you
15 that you would get a Rule 35?

16 A. Yes.

17 Q. She didn't promise you you'd get a sentence reduction?

18 A. Yes.

19 Q. Did -- Mr. Novak didn't promise you a Rule 35?

20 A. Yes.

21 Q. Or did he promise you a then reduction?

22 A. Yes.

23 Q. But back the first time around you testified no one
24 promised you a Rule 35, did they?

25 A. No.

1 Q. And no one promised you a sentence reduction, did they,
2 in 1997, did they?

3 A. No.

4 Q. Because they could not, right?

5 A. Yeah, they could not.

6 Q. It's up to the judge, right?

7 A. Yes.

8 Q. But you testified anyway?

9 A. Yes. Yeah.

10 Q. Because it was of value to you that potentially you
11 would get a sentence reduction?

12 MS. GOTTLIEB: Objection.

13 A. Yes.

14 THE COURT: I will allow that.

15 Q. And when you testified against Mr. Jimenez, you had no
16 promises, correct?

17 A. Yes.

18 Q. But you were getting a letter?

19 A. Yes.

20 Q. And Mr. Novak was going to consider a Rule 35?

21 MS. GOTTLIEB: Objection.

22 THE COURT: As to that. Sustained.

23 Q. You believed that Mr. Novak would consider a Rule 35?

24 MS. GOTTLIEB: Objection.

25 THE COURT: Sustained.

Andrew O'Brien-People-Re-Cross (Heeger)

1 MS. HEEGER: Your Honor, that goes to his state of
2 mind.

3 THE COURT: It is not necessary to assist him with
4 the testimony he's already given you.

5 You can try rephrasing it.

6 Q. You were hopeful you would get a Rule 35 motion?

7 A. Yes.

8 Q. And that hope was of value to you?

9 A. Well, hope is of value to everybody, right?

10 Q. So the hope that you would get that Rule 35 was worth
11 your testimony against Mr. Jimenez?

12 MS. GOTTLIEB: Objection.

13 THE COURT: The way that question is phrased, I am
14 going to sustain it.

15 Q. That Mr. Novak would consider filing a Rule 35 based
16 upon your cooperation in this case was one of your motivations
17 for testifying?

18 MS. GOTTLIEB: Objection.

19 THE COURT: Was it your hope that Mr. Novak would
20 consider filing the Rule 35 motion?

21 THE WITNESS: Yes.

22 THE COURT: Move on. Move on.

23 MS. HEEGER: All right. Nothing further.

24 THE COURT: Anything further?
25

1 RE-DIRECT EXAMINATION

2 BY MS. GOTTLIEB:

3 Q. Prior, did you ever tell, before you testified at the
4 Jimenez trial, did you tell AUSA Novak that you were seeking a
5 letter from ADA Mattaway?

6 A. I don't remember telling him that.

7 Q. And why did you testify in the Jimenez case?

8 A. Well, one is that, one is that, you know, at the time I
9 was cooperating with the Federal Government and I told them about
10 the incident, so they wanted to, you know -- I have to tell them
11 everything I knew. Once I cooperated, I had to tell them
12 everything I knew, everything I saw, everything I was involved
13 with. That was one. And also I kind of felt guilty because
14 that -- I felt that it was my -- I kind of caused the argument
15 partially and it got my friend killed.

16 Q. And you were also hoping for a letter?

17 A. For the letter, yes.

18 Q. For the letter?

19 A. Yes.

20 MS. GOTTLIEB: No further questions.

21 THE COURT: Anything further?

22 RE-CROSS EXAMINATION

23 BY MS. HEEGER:

24 Q. Mr. O'Brien, at Mr. Jimenez's trial you testified about
25 your cooperation. You were motivated to cooperate -- that you

1 testified that you were motivated to cooperate because of the
2 agreement with the Feds?

3 A. Yes.

4 Q. And you also testified about feeling guilty about
5 Shaka's death?

6 A. Yes.

7 Q. But didn't you testify that you were expecting ADA
8 Mattaway to tell Mr. Novak that you cooperated?

9 A. Yes.

10 Q. But you did not testify and tell the jury that you
11 hoped that Mr. Novak would file a Rule 35, did you?

12 A. Um, I don't, I don't, I don't recall that in that way.
13 You know, they asked me, they asked me -- I think they asked me
14 was I getting anything, and the only thing I said I knew is
15 that -- the only thing I know is that the ADA or whatever the DA
16 was going to, going to let the prosecutor know of my cooperation
17 in this case.

18 Q. But you left out the part in the hopes that the
19 prosecutor will file a Rule 35?

20 MS. GOTTLIEB: Objection.

21 THE COURT: Sustained.

22 Q. You didn't tell the jury that you were hoping for a
23 Rule 35?

24 MS. GOTTLIEB: Objection.

25 THE COURT: Sustained.

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1 MS. HEEGER: All right. Nothing further,
2 Your Honor.

3 THE COURT: Anything further?

4 MS. GOTTLIEB: Nothing further.

5 MR. CHAMOY: Nothing.

6 THE COURT: You may step down. Thank you.

7 (Whereupon, the witness, Andrew O'Brien, stepped
8 down from the stand and exited the courtroom.)

9 (Brief pause.)

10 THE COURT: Anything further at this time?

11 MR. CHAMOY: Nothing on behalf of the People,
12 Your Honor.

13 MS. HEEGER: Not regarding Mr. O'Brien.

14 THE COURT: All right. You wanted to discuss
15 July 11th at this time?

16 MS. HEEGER: Yes, Your Honor.

17 MR. CHAMOY: Go ahead.

18 THE COURT: Do you have a copy we can mark for the
19 purposes of the record?

20 MS. HEEGER: I do not have a copy.

21 THE COURT: Do you have a copy? Do you have --
22 we'll make a copy.

23 MS. HEEGER: Yes, I have mine.

24 THE COURT: We'll make a copy for the purposes of
25 the record.

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1 MR. CHAMOY: Also, Your Honor, on the record, we
2 were working out a stipulation regarding David Novak. I
3 have some proposed stipulations that the defense is looking
4 over.

5 THE COURT: That will be finalized?

6 MR. CHAMOY: Within a week.

7 MS. HEEGER: Within a week.

8 THE COURT: After that, we'll assume there will be
9 no more testimony or documents submitted to the Court.

10 MS. HEEGER: I guess that depends upon this
11 application here.

12 THE COURT: There is some markings on it. Are you
13 okay with that for a court exhibit?

14 MS. HEEGER: Yes.

15 THE COURT: I just want to make sure.

16 (Whereupon, Defendant's Exhibit H was marked in
17 evidence.)

18 COURT OFFICER: Defendant's Exhibit H is marked in
19 evidence.

20 MS. HEEGER: Your Honor, I served the People and
21 the Court on June 6th -- I'm sorry, June 20th with a letter
22 renewing the objections to the Court's scope ruling at the
23 last hearing and our objection is really two fold: One is
24 that the plea agreement, the 1997 plea agreement and the
25 letters that Mr. O'Brien sent to Judge Payne in 2007 that

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1 were provided to the People by AUSA Novak, are not beyond
2 the scope of the hearing, and we want to, you know,
3 reiterate our objection to the finding that they were not
4 within the scope. And I understand the opinion from the
5 Appellate Division because I think it's important to
6 distinguish those two documents were not included in the
7 Appellate Division's discussion about other documents in
8 which it found that there was no Brady violation there.
9 These two documents go to the subject of this hearing. They
10 go to a quid pro quo between Andrew O'Brien and that Andrew
11 O'Brien had for his testimony. And we would ask the Court
12 to reconsider its scope decision in that these documents are
13 part of this hearing, and now as part of that is the issue
14 of whether or not they were turned over, which at least
15 insofar as the plea agreement, the People are contesting.
16 And I think that Your Honor is going to need to make a
17 finding of fact as to whether or not those documents were
18 turned over. So that is why we think that there needs to be
19 more cross examination and exploration of that issue,
20 because I think the Court is going to need to determine
21 that.

22 That's one of the basis. The other has to do with
23 the elicitation by ADA Mattaway from Mr. O'Brien that he was
24 a sentenced prisoner with 18 years to go. We also believe
25 those were facts that the Appellate Division mentioned in

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1 its opinion as evidence that could go to a Brady violation
2 or prosecutorial misconduct, and that's part of this
3 hearing.

4 MR. CHAMOY: May I, Your Honor?

5 THE COURT: Yes, you may.

6 MR. CHAMOY: Briefly as to the latter, as to the
7 issue of him being a sentenced prisoner with 18 years to go.
8 I don't recall if there was any limitations by this Court in
9 the scope of the cross examination regarding Ms. Mattaway on
10 the question of whether or not that testimony was elicited
11 or otherwise discussed or what it meant. I don't recall
12 that being an issue. I do recall Ms. Mattaway stated she
13 didn't have an independent recollection of whether or not
14 the plea agreement had been turned over, which is basically
15 what they want to cross examine her on. And the problem
16 there is the record then has to speak for itself.
17 Basically, the only other person who was available to
18 testify is no longer, and that would be Patrick Bruno.
19 Unfortunately, he died during the pendency of this
20 litigation.

21 MS. HEEGER: Your Honor, I would, I would mention
22 Mr. Bruno did sign an affirmation that was part of the 440
23 practice in this case which he did address that specific
24 issue.

25 THE COURT: I am reserving a ruling on this.

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1 MS. HEEGER: Your Honor, I do have Mr. Bruno's
2 affirmation. Is that something the Court would want to
3 review, his affirmation?

4 THE COURT: I will take a copy of it. I remember
5 reviewing it at some point in time.

6 MS. HEEGER: Okay.

7 THE COURT: But now I don't remember in what
8 context. You have a copy? That will make my life easier.
9 I appreciate that.

10 MS. HEEGER: Okay.

11 THE COURT: This is a copy I can hold on to?

12 MS. HEEGER: Yes.

13 THE COURT: Thank you.

14 Okay. Off the record. Just step up briefly.

15 (Whereupon, a conference was held at the bench by
16 the Court and counsels, off the record.)

17 THE COURT: Go back on the record.

18 Pursuant to our bench conference, we will be
19 proceeding as follows: My chambers will be in contact with
20 all parties sometime mid to late August to set up a
21 telephone conference in early September, at which point the
22 parties will be advised as to my ruling with regards to
23 these two outstanding matters.

24 My understanding is that the stipulation will be
25 filed with the Court once it is agreed upon. And in that

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1 telephone conference we will further discuss timetables as
2 to how we proceed. And at this point both sides are
3 requesting to file their final arguments in writing.

4 Is that a fair and accurate representation of our
5 bench conference?

6 MS. HEEGER: Yes, Judge.

7 MR. CHAMOY: Yes.

8 THE COURT: Is there anything that we discussed at
9 the bench conference that I left out or either side wishes
10 to enhance?

11 MS. HEEGER: No.

12 MR. CHAMOY: No.

13 THE COURT: Okay. All right, in that case, you
14 will be hearing from my chambers again mid to late August.

15 MS. HEEGER: Thank you, Judge.

16 THE COURT: Thank you all. Have a good day.

17 Oh, I am going to ask you to submit all your
18 exhibits now, whatever exhibits, you have to submit them now
19 so that we'll have them readily available.

20 One more thing, everyone please, just for the
21 purposes of controlling and keeping track of it in the court
22 system, everybody's okay with me just putting it down as a
23 September 29th date?

24 MS. HEEGER: Yes.

25 THE COURT: All right. Again, we can revisit that

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1 on our telephone conference, but this way we have a control
2 date and in the system it is being tracked.

3 MR. CHAMOY: Yes, Judge.

4 THE COURT: Everybody okay with that?

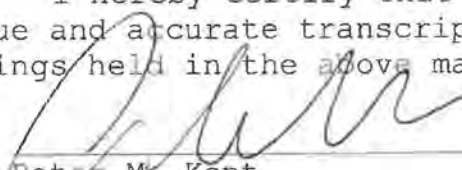
5 MS. HEEGER: Yes, sir.

6 THE COURT: Thank you.

7 ***

8
9 REPORTER'S CERTIFICATION:

10 I hereby certify that the foregoing
11 is a true and accurate transcript of the
12 proceedings held in the above matter.

13 
14 Peter M. Kent
15 Senior Court Reporter
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